

December 21, 2016

Administrator Gina McCarthy  
Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

RECEIVED  
2016 DEC 27 PM 2:48  
OFFICE OF THE  
EXECUTIVE SECRETARIAT

RE: Addendum #4 to November 2011 Petition

Dear Administrator McCarthy:

The purpose of this new addendum is to alert you that Ohio's July 2016 application to transfer the NPDES Permit Program for concentrated animal feeding operations (CAFOs) to the Ohio Department of Agriculture (ODA) violates the Clean Water Act (CWA). This addendum documents two issues: 1) Ohio's new application is for concentrated animal feeding facilities (CAFFs) – not for concentrated animal feeding operations (CAFOs) that are regulated under the CWA; and 2) Ohio EPA has repeatedly issued permits under the authorized State NPDES Permit Program that do not conform to CWA requirements.

Attached are documents that explain how the ODA's CAFF program circumvents CWA regulations because these State laws are for concentrated animal feeding facilities – not for concentrated animal feeding operations. NPDES definitions are for CAFOs – there is nothing in CWA about CAFFs. Therefore, we are including copies of the following documents and requesting that they be appended to our 2011 petition:

1. 40 C.F.R. §123.63 – Criteria for withdrawal of State programs.
2. 40 C.F.R. §123.64 – Procedures for withdrawal of State programs.
3. Senate Bill 141 (SB 141):
  - Original version transferred authority to issue permits for concentrated animal feeding operations (CAFOs)
  - Approved version transferred authority to issue permits for concentrated animal feeding facilities (CAFFs)
4. EPA Summary of the Second Circuit's Decision in the CAFO Litigation
5. 40 C.F.R. §122.23 Concentrated animal feeding operations (applicable to State NPDES programs) - (i)(2) *Eligibility criteria* In order to certify that a CAFO does not discharge or propose to discharge, the owner or operator of a CAFO must document, based on an objective assessment of the conditions at the CAFO, that the CAFO is designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge...
6. 40 C.F.R. §124.2 definitions

7. Regulation of Concentrated Animal Feeding Operations under the Federal Clean Water Act (National AgLaw Center Research Outline)
8. Ohio Revised Code 903.01 definitions – (O) “NPDES permit” means a permit issued under the national pollutant discharge elimination system established in section 402 of the Federal Water Pollution Control Act and includes the renewal of such a permit. “NPDES permit” includes the federally enforceable provisions of a permit to operate into which NPDES permit provisions have been incorporated.
9. Robert Tolpa November 2007 letter to Robert Boggs, ODA Director. “...it is our understanding that CAFOs would need to have both a permit to operate (PTO) and an NPDES permit, and that the NPDES provisions would be incorporated into, and specified in the PTO. Understanding of this dual permitting approach is critical to understanding how ODA intends to regulate CAFOs.”
10. 6<sup>th</sup> District Court May 2015 reference to Kevin Elder’s Affidavit – “ODA’s PTIs and PTOs are not federally enforceable under the Act’s § 402 NPDES permitting scheme because PTIs and PTOs do not regulate actual point source discharges of pollutants from CAFOs.”
11. October 2014 Affidavit of Kevin Elder #9 - “The PTO is not administered according to the Clean Water Act and is not a part of Ohio EPA’s NPDES permit program for CAFOs”.
12. ODA Crosswalk – 40 C.F.R. Part 122 EPA Administered Permit Program “A application for a permit to install, a permit to operate, or a NPDES permit to be deemed complete must include:” – and all of these fall under 122.21(a)(i)(A)
13. 40 C.F.R. §122.21 – Application for a permit (applicable to State programs)
14. Listing of Current ODA Permitted Facilities – all of these operations are defined by the number of animals and should be federally designated as large CAFOs under the CWA – not as CAFFs under the ODA Program. The ODA simply cannot issue any permits for large CAFOs without federal authority.

No State agency is implementing the CWA rules for CAFOs. In 1974 the Ohio EPA was given sole authority for the NPDES Permit Program for point sources, including CAFOs. On August 19, 2002, Ohio EPA basically abandoned its CAFO Program which included regulations under 40 C.F.R. 122 and Part 412. Therefore, we ask again for U.S. EPA to withdraw Ohio’s NPDES Permit Program for CAFOs. More documentation will be supplied at the promised meeting with Region 5 personnel.

The second issue is documented in the attached December 17, 2016, letter from Petitioner Vickie Askins to U.S. EPA Administrator Gina McCarthy. Ohio EPA has repeatedly issued permits to the (b)(6) Dairy (and subsequent operators and owners) which did not conform to the requirements of the Clean Water Act. The Ohio EPA has also repeatedly failed to act on NPDES violations including the fact that this CAFO has never had a valid nutrient management plan that complies with the CAFO rules. Now the Ohio EPA claims this NPDES Permit has expired and that the new

owner is planning to expand which means they will apply to the ODA again for another State CAFF permit.

For the aforementioned reasons, we are requesting that U.S. EPA order Ohio to immediately cease issuing all CAFO permits and take other actions as are deemed necessary and appropriate. We ask that you review the attached packet for additional information which supports our request.

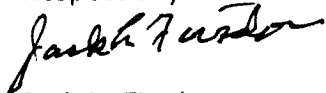
As we understand it from Ohio EPA, Region 5 has tentatively approved the ODA's latest application/program but must deal with our 2011 Petition before proceeding. We appreciate that Region 5 has offered to meet with us about our Petition, however with regard to Michael Berman's 2014 email; we were preparing to file our complaint since it had already been almost six months since we had submitted our 90-day N.O.I. with no response from EPA. Since Mr. Berman's email stated it would be an "informal meeting" with a "technical staff person" who would not be available until September, we felt a sense of urgency to proceed with our complaint. This proved to be especially significant since almost 500,000 Toledo-area residents were denied safe drinking water that same week-end in August 2014.

Since our complaint and appeal have been dismissed due to a technicality, we would now like to meet to resolve our critical concerns about Ohio's split/phased CAFO/CAFF NPDES permitting programs. We diligently assembled and submitted documentation for every issue in our 200+page petition. If Region 5 needs any additional information, please list the issues that are delaying their review and we will bring those documents to the meeting.

Attached is a copy of a 2007 letter Regional Administrator Mary Gade sent to the attorney who represented citizens from Putnam County regarding their 2000 petition. We would appreciate it if we could be afforded this same opportunity to meet either in Toledo or even better, at the EPA District Office in Bowling Green. We would also appreciate if Cheryl Burdett and Julianne Socha could be present as well as any others with knowledge of our petition and authority to discuss solutions. Petitioner Vickie Askins wrote to Program Manager Burdett five months ago, asking if she would be present at the meeting, but she did not reply.

Please advise how we could facilitate this meeting. Hopefully you agree it would be inappropriate for any ODA personnel to attend. We appreciate the opportunity to add a fourth addendum to our 2011 Petition and look forward to meeting with Region 5 in the near future.

Respectfully submitted,



Jack L. Firsdon



Larry D. Askins



Vickie A. Askins

Attachments

cc: President Barack Obama  
Senator Sherrod Brown  
Congresswoman Marcy Kaptur

Vickie A. Askins  
(b) (6)  
Cygnet, Ohio 43413  
(b) (6)

December 17, 2016

Administrator Gina McCarthy  
Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

RE: (b)(6) Land Company, LLC NPDES Permit

Dear Administrator McCarthy:

The purpose of this letter is to alert you that Ohio EPA's NPDES Permit Program for concentrated animal feeding operations (CAFOs) is in violation of 40 C.F.R. 123.63 (a)(2)(ii) **Repeated issuance of permits which do not conform to the requirements of this part** as well as other laws. Please accept my updated information contained herein as proof that Ohio EPA has already essentially abandoned their duties to administer the NPDES Permit Program for CAFOs in anticipation of transferring this Program to the Ohio Department of Agriculture (ODA). Therefore, I once again respectfully request the U.S. EPA initiate formal proceedings under 40 C.F.R. § 123.64(b) to withdraw approval of the State of Ohio's NPDES program for CAFOs as requested in our 2011 Petition.

On December 1st, Ohio EPA Rick Wilson and Darla Peele met with (b) (6) d and me at the Ohio EPA NW District office in Bowling Green. We appreciated their willingness to meet and their explanations; however, it was obvious there is much confusion within the Ohio EPA since Rick and other experienced staff members who worked with the CAFO NPDES Permit Program have been transferred to other departments. I find it very worrisome that Rick is basically the *only* Ohio EPA employee who is working *part-time* on the NPDES permit program for CAFOs. This is especially troublesome since nutrient pollution has been fueling toxic algal blooms in Lake Erie and other Ohio lakes for several years. I'm sure you agree that transferring experienced employees does not remove Ohio EPA's duties under the NPDES Permit Program.

Attached is a summary of just one NPDES-permitted CAFO in Wood County. Although EPA has acknowledged there are problems, Region 5 Director Christopher Korleski stated in his October 20, 2016, response that "no further action was needed." How can no action be needed since EPA has repeatedly complained this NPDES Permit has *no valid nutrient management plan* (NMP)?

I hope U.S. EPA doesn't think these long-standing CAFO issues in Ohio are going to magically disappear now that Region 5 is reconsidering the Ohio Department of Agriculture's new transfer application. We explained at great length how fraudulent the ODA's current CAFF Program is in our 2011 Petition. It boggles my mind that EPA would ever seriously consider transferring more authority to a captured State agency that has repeatedly shown they are unwilling to hold CAFFs/CAFOs accountable for their waste.



We appreciate that Ohio EPA has recently agreed to investigate a Verified Complaint (b) (6) and I submitted in July 2016. However, we are very troubled that Ohio EPA allowed this NPDES Permit to expire on February 28, 2015 since (b)(6) has not demonstrated that this CAFO no longer could have discharges to waters of the state. Plus, this NPDES Permit does not now, nor has it ever, had a valid NMP. According to public records, the Ohio EPA inspected this operation this summer and commented "it was apparent that contaminated production area runoff (from feed storage area) is not contained." Past issues with un-contained production area runoff and discharges of manure to waters of the state are part of the reason this facility is currently regulated as a Medium CAFO by Ohio EPA."

Please note that (b) (6) and I submitted our first Verified Complaint VC14013W01VA regarding the former (b) (6) Dairy on May 30, 2014 – nine months before this NPDES Permit supposedly expired. Our first Complaint questioned the lack of a valid NMP as well as many other issues:

- Why did Ohio EPA allow AgStar/Dairy Acquisition 1 to maintain a full manure pond in violation of the NPDES Permit closure regulations after (b) (6) Dairy was closed for production in 2011? As you know, the closure regulations state "In the event that this facility is closed for production purposes or is no longer a CAFO, this permit shall remain effective until the permittee demonstrates to the satisfaction of the Director that there is no remaining potential for a discharge of manure that was generated while the operation was a CAFO... **All manure shall be properly disposed of** [and] the manure storage or treatment facilities shall be properly closed." As noted in my attached timeline (b) (6) had closed this facility for production purposes in 2010 but Dairy Acquisition 1 did not actually sell this facility to (b)(6) until 2014. Plus this facility has been closed for production more than once.
- Why did Ohio EPA allow (b) (6) Dairy to incorporate an ODA manure management plan for (b) (6) cows in their NPDES Permit for a CAFO that only housed (b) cows especially since Ohio EPA admitted the ODA's MMP did not comply with the 2008 CAFO Rule?
- Why did Ohio EPA approve the transfer(s) of the NPDES Permit since the language in the permit clearly states "This permit may be transferred or assigned...provided the following requirements are met...A written agreement containing a specific date for transfer of permit responsibility and coverage between the current and new permittee (including acknowledgement that the existing permittee is liable for violations up to that date, and that the new permittee is liable for violations from that date on) shall be submitted to the appropriate Ohio EPA district office..." The Transfer Application stated that (b) (6) "agrees to continue the responsibility for compliance with all terms, limitations and conditions, and any coverage and liability."
- Why didn't the Director address and resolve the numerous other concerns we had incorporated in our 2014 Complaint in his December 9, 2015 Director's Final Findings and Orders? I had emailed Ohio EPA attorney Pete Simcic on October 7, 2015 about these omissions after reading the Director's "proposed" Final Findings and Order - but I do not believe he replied.

I had noted the February 2015 expiration date on a timeline I submitted to Ohio EPA Cathy Alexander on June 28, 2016 to which she never replied. However, I would question how Ohio EPA could allow this permit to expire:

- Did Ohio EPA review compliance with the NPDES Permit, regulations, order and schedules of compliance – or has noncompliance with the existing permit been resolved by an appropriate compliance action?
- Why did Ohio EPA continue to work with (b) (6) and (b)(6) after February 28, 2015 if the permit had expired?
- Why did Ohio EPA reply to (b) (6) and me on November 17, 2016 that our July 2016 Verified Complaint was valid?

The NPDES Permit explicitly states that manure has to be “applied in compliance with the manure management plan and this permit.” Please explain how they could comply since **this NPDES-permitted CAFO has never had a valid NMP and now has no NMP.**

Another extremely troubling issue in the NPDES Permit states that the permit holder must develop the updated Manure Management Plan “within one week of this deadline” which was January 19, 2012. I believe this same language was in every NPDES Permit for (b) (6), Dairy Acquisition 1, (b)(6) and (b)(6). Every permit stated that a manure land application plan should be implemented to comply with:

- 1) a total nutrient budget;
- 2) manure and soil characterizations;
- 3) application methods; and
- 4) timing and field specific agronomic application rates.

As I reviewed my box of Ohio EPA public records for the past 13 years – there has never been a manure land application plan that complied with the NPDES Permit! There was one set of soil tests but almost all the STP on these soil tests was either high or very high. In addition, as I understand it, the farmer/landowner who submitted those soil tests no longer takes manure on his fields. In other words, this NPDES-permitted CAFO has been in violation of its NPDES Permit for many years because there is: no nutrient budget; no up-to-date soil tests or manure analyses; no application methods; and no timing and field specific application rates.

It appears all of these issues would call into question Ohio EPA’s State program because Ohio EPA has failed to take corrective action as follows:

#### **40 CFR § 123.63 Criteria for withdrawal of State programs.**

(a) In the case of a sewage sludge management program, references in this section to “this part” will be deemed to refer to 40 CFR part 501. The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

- (1) Where the State’s legal authority no longer meets the requirements of this part, including:

- (i) Failure of the State to promulgate or enact new authorities when necessary; or
- (ii) Action by a State legislature or court striking down or limiting State authorities.
- (2) Where the operation of the State program fails to comply with the requirements of this part, including:
  - (i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;
  - (ii) **Repeated issuance of permits which do not conform to the requirements of this part;** or
  - (iii) Failure to comply with the public participation requirements of this part.
- (3) Where the State's enforcement program fails to comply with the requirements of this part, including:
  - (i) **Failure to act on violations of permits or other program requirements;**
  - (ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or
  - (iii) Failure to inspect and monitor activities subject to regulation.

According to an Ohio EPA Fact Sheet - Ohio EPA Livestock Operation Inspections – What to Expect – **“For more serious violations or a history of violations, Ohio EPA may begin a civil suit, asking a court to require corrective actions and to impose a penalty.”** Please see my attached summary/timeline for a detailed history of violations and other issues/problems that includes over 100 entries. I urge you to investigate why Ohio EPA has not asked a court to require corrective actions and impose penalties.

The (b) (6) /Dairy Acquisition 1 (b)(6) Dairy NPDES Permits prove that Ohio's split/phased CAFF/CAFO permitting programs are a sham. It appears Ohio EPA can avoid compliance with NPDES regulations altogether by not taking appropriate enforcement action against (b) (6) Dairy, Dairy Acquisition 1, (b)(6) Dairy, or (b)(6) Land Company.

Ohio's CAFO permitting scheme does not bode well for Lake Erie. Therefore, I urge you to either bring Ohio's NPDES permitting program for CAFOs into compliance or else withdraw program approval - since this State program no longer complies with the requirements of the CWA.

Respectfully,



Vickie A. Askins

Attachment

cc: Senator Sherrod Brown  
State Senator Randy Gardner  
State Representative Theresa Gavarone  
Wood County Commissioners  
Herman McCreary

(1)

(1) The State shall submit a modified program description, Attorney General's statement, Memorandum of Agreement, or such other documents as EPA determines to be necessary under the circumstances.

(2) Whenever EPA determines that the proposed program revision is substantial, EPA shall issue public notice and provide an opportunity to comment for a period of at least 30 days. The public notice shall be mailed to interested persons and shall be published in the FEDERAL REGISTER and in enough of the largest newspapers in the State to provide Statewide coverage. The public notice shall summarize the proposed revisions and provide for the opportunity to request a public hearing. Such a hearing will be held if there is significant public interest based on requests received.

(3) The Administrator will approve or disapprove program revisions based on the requirements of this part (or, in the case of a sewage sludge management program, 40 CFR part 501) and of the CWA.

(4) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the FEDERAL REGISTER. Notice of approval of non-substantial program revisions may be given by a letter from the Administrator to the State Governor or his designee.

(c) States with approved programs must notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and must identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) of this section. Organizational charts required under §123.22(b) (or, in the case of a sewage sludge management program, §501.12(b) of this chapter) must be revised and resubmitted.

(d) Whenever the Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as are necessary.

(e) *State NPDES programs only.* All new programs must comply with these regulations immediately upon approval. Any approved State section 402 permit program which requires revision to conform to this part shall be so revised within one year of the date of promulgation of these regulations, unless a State must amend or enact a statute in order to make the required revision in which case such revision shall take place within 2 years, except that revision of State programs to implement the requirements of 40 CFR part 403 (pretreatment) shall be accomplished as provided in 40 CFR 403.10. In addition, approved States shall submit, within 6 months, copies of their permit forms for EPA review and approval. Approved States shall also assure that permit applicants, other than POTWs, submit, as part of their application, the information required under §§124.4(d) and 122.21 (g) or (h), as appropriate.

(f) Revision of a State program by a Great Lakes State or Tribe (as defined in 40 CFR 132.2) to conform to section 118 of the CWA and 40 CFR part 132 shall be accomplished pursuant to 40 CFR part 132.

[48 FR 14178, Apr. 1, 1983, as amended at 49 FR 31842, Aug. 8, 1984; 50 FR 6941, Feb. 19, 1985; 53 FR 33007, Sept. 6, 1988; 58 FR 67983, Dec. 22, 1993; 60 FR 15386, Mar. 23, 1995; 63 FR 45123, Aug. 24, 1998]

[↑ Back to Top](#)

### **§123.63 Criteria for withdrawal of State programs.**

(a) In the case of a sewage sludge management program, references in this section to "this part" will be deemed to refer to 40 CFR part 501. The Administrator may withdraw program approval when a

State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

- (1) Where the State's legal authority no longer meets the requirements of this part, including:
  - (i) Failure of the State to promulgate or enact new authorities when necessary; or
  - (ii) Action by a State legislature or court striking down or limiting State authorities.
- (2) Where the operation of the State program fails to comply with the requirements of this part, including:
  - (i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;
  - (ii) Repeated issuance of permits which do not conform to the requirements of this part; or
  - (iii) Failure to comply with the public participation requirements of this part.
- (3) Where the State's enforcement program fails to comply with the requirements of this part, including:
  - (i) Failure to act on violations of permits or other program requirements;
  - (ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or
  - (iii) Failure to inspect and monitor activities subject to regulation.
- (4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under §123.24 (or, in the case of a sewage sludge management program, §501.14 of this chapter).
- (5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.
- (6) Where a Great Lakes State or Tribe (as defined in 40 CFR 132.2) fails to adequately incorporate the NPDES permitting implementation procedures promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132 into individual permits.

(b) [Reserved]

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 54 FR 23897, June 2, 1989; 60 FR 15386, Mar. 23, 1995; 63 FR 45123, Aug. 24, 1998]

 [Go to Top](#)

#### **§123.64 Procedures for withdrawal of State programs.**

(a) A State with a program approved under this part (or, in the case of a sewage sludge management program, 40 CFR part 501) may voluntarily transfer program responsibilities required by Federal law to EPA by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

- (1) The State shall give the Administrator 180 days notice of the proposed transfer and shall submit a plan for the orderly transfer of all relevant program information not in the possession of EPA



(2)

State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

(1) Where the State's legal authority no longer meets the requirements of this part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) Where the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) Where the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under §123.24 (or, in the case of a sewage sludge management program, §501.14 of this chapter).

(5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.

(6) Where a Great Lakes State or Tribe (as defined in 40 CFR 132.2) fails to adequately incorporate the NPDES permitting implementation procedures promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132 into individual permits.

(b) [Reserved]

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 54 FR 23897, June 2, 1989; 60 FR 15386, Mar. 23, 1995; 63 FR 45123, Aug. 24, 1998]

[↑ Back to Top](#)

#### **§123.64 Procedures for withdrawal of State programs.**

(a) A State with a program approved under this part (or, in the case of a sewage sludge management program, 40 CFR part 501) may voluntarily transfer program responsibilities required by Federal law to EPA by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

(1) The State shall give the Administrator 180 days notice of the proposed transfer and shall submit a plan for the orderly transfer of all relevant program information not in the possession of EPA

(such as permits, permit files, compliance files, reports, permit applications) which are necessary for EPA to administer the program.

(2) Within 60 days of receiving the notice and transfer plan, the Administrator shall evaluate the State's transfer plan and shall identify any additional information needed by the Federal government for program administration and/or identify any other deficiencies in the plan.

(3) At least 30 days before the transfer is to occur the Administrator shall publish notice of the transfer in the FEDERAL REGISTER and in enough of the largest newspapers in the State to provide Statewide coverage, and shall mail notice to all permit holders, permit applicants, other regulated persons and other interested persons on appropriate EPA and State mailing lists.

(b) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program.

(1) *Order.* The Administrator may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in §123.63 (or, in the case of a sewage sludge management program, §501.33 of this chapter). The Administrator will respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph will fix a time and place for the commencement of the hearing and will specify the allegations against the State which are to be considered at the hearing. Within 30 days the State must admit or deny these allegations in a written answer. The party seeking withdrawal of the State's program will have the burden of coming forward with the evidence in a hearing under this paragraph.

(2) *Definitions.* For purposes of this paragraph the definitions of "Act," "Administrative Law Judge," "Hearing Clerk," and "Presiding Officer" in 40 CFR 22.03 apply in addition to the following:

(i) *Party* means the petitioner, the State, the Agency, and any other person whose request to participate as a party is granted.

(ii) *Person* means the Agency, the State and any individual or organization having an interest in the subject matter of the proceeding.

(iii) *Petitioner* means any person whose petition for commencement of withdrawal proceedings has been granted by the Administrator.

(3) *Procedures.* (i) The following provisions of 40 CFR part 22 (Consolidated Rules of Practice) are applicable to proceedings under this paragraph:

- (A) §22.02—(use of number/gender);
- (B) §22.04(c)—(authorities of Presiding Officer);
- (C) §22.06—(filing/service of rulings and orders);
- (D) §22.09—(examination of filed documents);
- (E) §22.19(a), (b) and (c)—(prehearing conference);
- (F) §22.22—(evidence);
- (G) §22.23—(objections/offers of proof);



(H) §22.25—(filing the transcript); and

(I) §22.26—(findings/conclusions).

(ii) The following provisions are also applicable:

(A) *Computation and extension of time*—(1) *Computation*. In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday, or legal holiday, the stated time period shall be extended to include the next business day.

(2) *Extensions of time*. The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (i) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (ii) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(3) The time for commencement of the hearing shall not be extended beyond the date set in the Administrator's order without approval of the Administrator.

(B) *Ex parte discussion of proceedings*. At no time after the issuance of the order commencing proceedings shall the Administrator, the Regional Administrator, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party, shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

(C) *Intervention*—(1) *Motion*. A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the foregoing sentence and paragraph (b)(3)(ii)(C)(3) of this section, within ten (10) days after service of the motion for leave to intervene.

(2) However, motions to intervene must be filed within 15 days from the date the notice of the Administrator's order is first published.

(3) *Disposition*. Leave to intervene may be granted only if the movant demonstrates that (i) his presence in the proceeding would not unduly prolong or otherwise prejudice that adjudication of the rights of the original parties; (ii) the movant will be adversely affected by a final order; and (iii) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(4) *Amicus curiae*. Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order

setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

(D) *Motions*—(1) *General*. All motions, except those made orally on the record during a hearing, shall (i) be in writing; (ii) state the grounds therefor with particularity; (iii) set forth the relief or order sought; and (iv) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by paragraph (b)(4) of this section.

(2) *Response to motions*. A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

(3) *Decision*. The Administrator shall rule on all motions filed or made after service of the recommended decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, Regional Administrator, or the Administrator considers it necessary or desirable.

(4) *Record of proceedings*. (i) The hearing shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed by an official reporter designated by the Presiding Officer;

(ii) All orders issued by the Presiding Officer, transcripts of testimony, written statements of position, stipulations, exhibits, motions, briefs, and other written material of any kind submitted in the hearing shall be a part of the record and shall be available for inspection or copying in the Office of the Hearing Clerk, upon payment of costs. Inquiries may be made at the Office of the Administrative Law Judges, Hearing Clerk, 1200 Pennsylvania Ave., NW., Washington, DC 20460;

(iii) Upon notice to all parties the Presiding Officer may authorize corrections to the transcript which involves matters of substance;

(iv) An original and two (2) copies of all written submissions to the hearing shall be filed with the Hearing Clerk;

(v) A copy of each submission shall be served by the person making the submission upon the Presiding Officer and each party of record. Service under this paragraph shall take place by mail or personal delivery;

(vi) Every submission shall be accompanied by an acknowledgement of service by the person served or proof of service in the form of a statement of the date, time, and manner of service and the names of the persons served, certified by the person who made service, and;

(vii) The Hearing Clerk shall maintain and furnish to any person upon request, a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives.

(5) *Participation by a person not a party*. A person who is not a party may, in the discretion of the Presiding Officer, be permitted to make a limited appearance by making oral or written statement of his/her position on the issues within such limits and on such conditions as may be fixed by the Presiding Officer, but he/she may not otherwise participate in the proceeding.

(6) *Rights of parties*. (i) All parties to the proceeding may:

(A) Appear by counsel or other representative in all hearing and pre-hearing proceedings;

(B) Agree to stipulations of facts which shall be made a part of the record.

(7) *Recommended decision.* (i) Within 30 days after the filing of proposed findings and conclusions, and reply briefs, the Presiding Officer shall evaluate the record before him/her, the proposed findings and conclusions and any briefs filed by the parties and shall prepare a recommended decision, and shall certify the entire record, including the recommended decision, to the Administrator.

(ii) Copies of the recommended decision shall be served upon all parties.

(iii) Within 20 days after the certification and filing of the record and recommended decision, all parties may file with the Administrator exceptions to the recommended decision and a supporting brief.

(8) *Decision by Administrator.* (i) Within 60 days after the certification of the record and filing of the Presiding Officer's recommended decision, the Administrator shall review the record before him and issue his own decision.

(ii) If the Administrator concludes that the State has administered the program in conformity with the appropriate Act and regulations his decision shall constitute "final agency action" within the meaning of 5 U.S.C. 704.

(iii) If the Administrator concludes that the State has not administered the program in conformity with the appropriate Act and regulations he shall list the deficiencies in the program and provide the State a reasonable time, not to exceed 90 days, to take such appropriate corrective action as the Administrator determines necessary.

(iv) Within the time prescribed by the Administrator the State shall take such appropriate corrective action as required by the Administrator and shall file with the Administrator and all parties a statement certified by the State Director that such appropriate corrective action has been taken.

(v) The Administrator may require a further showing in addition to the certified statement that corrective action has been taken.

(vi) If the State fails to take such appropriate corrective action and file a certified statement thereof within the time prescribed by the Administrator, the Administrator shall issue a supplementary order withdrawing approval of the State program. If the State takes such appropriate corrective action, the Administrator shall issue a supplementary order stating that approval of authority is not withdrawn.

(vii) The Administrator's supplementary order shall constitute final Agency action within the meaning of 5 U.S.C. 704.

(viii) Withdrawal of authorization under this section and the appropriate Act does not relieve any person from complying with the requirements of State law, nor does it affect the validity of actions by the State prior to withdrawal.

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 57 FR 5335, Feb. 13, 1992; 63 FR 45123, Aug. 24, 1998]

↑ See, e.g.,

(3)

Welcome to the  
**130<sup>TH</sup> GENERAL ASSEMBLY**  
of the State of Ohio

<a href="#">Search for Legislative Information</a>	<a href="#">Laws, Acts, and Legislation</a>	<a href="#">The Ohio House of Representatives</a>	<a href="#">The Ohio Senate</a>	<a href="#">Ohio's Legislative Agencies</a>
<a href="#">Legislative Schedules</a>	<a href="#">Session Video</a>	<a href="#">Executive &amp; Judicial Branches</a>	<a href="#">About Ohio's State Government</a>	<a href="#">Education Topics and Legislative Reports</a>

[Return to Laws Page](#)

**SB 141**

[As Reported by](#)

[Committee](#)

[View Full Text with Line Numbers](#)

[View Publications Associated with this Bill](#)

[Bill Analyses](#)

[Fiscal Notes](#)

[Status Report of Legislation](#)

[Bill Sponsors](#)

[SENATOR MUMPER](#)

[Other Versions of Bill and Associated Reports](#)

[As Enrolled](#)

[As Passed by House](#)

[As Passed by Senate](#)

[As Introduced](#)

[HELP - Field Definitions for this Page](#)

The online versions of legislation provided on this website are not official. Enrolled bills are the final version passed by the Ohio General Assembly and presented to the Governor for signature. The official version of acts signed by the Governor are available from the Secretary of State's Office in the Continental Plaza, 180 East Broad St., Columbus.

**As Reported by the Senate Agriculture Committee**

**123rd General Assembly  
Regular Session  
1999-2000**

**Sub. S. B. No. 141**

**SENATOR MUMPER**

**A BILL**

To amend sections 1511.021, 3745.04, 6111.03, 6111.035, 6111.036, 6111.04, and 6111.44 and to enact sections 307.203, 505.266, 903.01, 903.02, 903.021, 903.03 to 903.18, and 903.99 of the Revised Code to transfer authority to issue permits for the construction of new or modification of existing concentrated animal feeding operations from the Director of Environmental Protection to the Director of Agriculture, to provide for the regulation of concentrated animal feeding operations, to transfer authority to issue national pollutant discharge elimination system permits for agricultural operations and certain other entities from the Director of Environmental Protection to the Director of Agriculture, to require certain existing concentrated animal feeding operations to obtain review compliance certificates, and to make an appropriation.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 1511.021, 3745.04, 6111.03, 6111.035, 6111.036, 6111.04, and 6111.44 be amended and sections 307.203, 505.266, 903.01, 903.02, 903.021, 903.03, 903.04, 903.05, 903.06, 903.07, 903.08, 903.09, 903.10, 903.11, 903.12, 903.13, 903.14, 903.15, 903.16, 903.17, 903.18, and 903.99 of the Revised Code be enacted to read as follows:

Sec. 307.203. (A) AS USED IN THIS SECTION:

- (1) "ANIMAL UNIT," "CONCENTRATED ANIMAL FEEDING OPERATION," AND "MAJOR CONCENTRATED ANIMAL FEEDING OPERATION" HAVE THE SAME MEANINGS AS IN SECTION 903.01 of the Revised Code.
- (2) "IMPROVEMENT" MEANS THE CONSTRUCTION, MODIFICATION, OR BOTH OF COUNTY INFRASTRUCTURE.
- (3) "OPERATION" MEANS A PROPOSED NEW OR EXPANDED MAJOR CONCENTRATED ANIMAL FEEDING OPERATION.

(B) A PERSON WHO PROPOSES TO DO ANY OF THE FOLLOWING SHALL MEET WITH THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY IN WHICH AN OPERATION IS OR IS TO BE LOCATED:

- (1) ESTABLISH A NEW MAJOR CONCENTRATED ANIMAL FEEDING OPERATION;
- (2) INCREASE THE NUMBER OF ANIMAL UNITS OF DESIGN CAPACITY OF AN EXISTING MAJOR CONCENTRATED ANIMAL FEEDING OPERATION BY TEN PER CENT OR MORE IN EXCESS OF THE DESIGN CAPACITY SET FORTH IN THE CURRENT PERMIT FOR CONSTRUCTION OR MODIFICATION OF THE OPERATION OR FOR INSTALLATION OR MODIFICATION OF THE DISPOSAL SYSTEM FOR MANURE AT THE OPERATION ISSUED UNDER SECTION 903.02 OR DIVISION (J) OF SECTION 6111.03 of the Revised Code, AS APPLICABLE;
- (3) INCREASE THE NUMBER OF ANIMAL UNITS OF DESIGN CAPACITY OF AN EXISTING CONCENTRATED ANIMAL FEEDING OPERATION BY TEN PER CENT OR MORE IN EXCESS OF THE DESIGN CAPACITY SET FORTH IN THE CURRENT PERMIT FOR CONSTRUCTION OR MODIFICATION OF THE OPERATION OR FOR INSTALLATION OR MODIFICATION OF THE DISPOSAL SYSTEM FOR MANURE AT THE OPERATION ISSUED UNDER SECTION 903.02 OR DIVISION (J) OF SECTION 6111.03 of the Revised Code, AS APPLICABLE, AND TO A DESIGN CAPACITY OF MORE



Welcome to the  
**129<sup>TH</sup> GENERAL ASSEMBLY**  
*of the State of Ohio*

[Search for Legislative Information](#)
[Laws, Acts, and Legislation](#)
[The Ohio House of Representatives](#)
[The Ohio Senate](#)
[Ohio's Legislative Agencies](#)
[Legislative Schedules](#)
[Session Video](#)
[Executive & Judicial Branches](#)
[About Ohio's State Government](#)
[Education Topics and Legislative Reports](#)
[Return to Laws Page](#)

## SB 141

[As Passed by House](#)
[View Full Text with Line Numbers](#)
[View Publications Associated with this Bill](#)
[Bill Analyses](#)
[Fiscal Notes](#)
[Status Report of Legislation](#)
[Bill Sponsors](#)

**REPRESENTATIVES:**  
VESPER BUCHY  
ASLANIDES COLLIER  
WIDENER NETZLEY  
KRUPINSKI HOOD  
STAPLETON EVANS  
FLANNERY BARNES

**SENATORS:**  
MUMPER DRAKE WHITE  
KEARNS

[Other Versions of Bill and Associated Reports](#)
[As Enrolled](#)
[As Passed by Senate](#)
[As Reported by Committee](#)
[As Introduced](#)
[HELP - Field Definitions for this Page](#)

The online versions of legislation provided on this website are not official. Enrolled bills are the final version passed by the Ohio General Assembly and presented to the Governor for signature. The official version of acts signed by the Governor are available from the Secretary of State's Office in the Continental Plaza, 180 East Broad St., Columbus.

**As Passed by the House**

### 123rd General Assembly Regular Session 1999-2000

**Sub. S. B. No. 141**

**SENATORS MUMPER-DRAKE-WHITE-KEARNS  
REPRESENTATIVES VESPER-BUCHY-ASLANIDES-COLLIER-WIDENER- NETZLEY-KRUPINSKI-HOOD-  
STAPLETON-EVANS-FLANNERY-BARNES**

## A BILL

To amend sections 1511.02, 1511.021, 1511.022, 1511.07, 1511.071, 1515.08, 3745.04, 6111.03, 6111.035, 6111.04, 6111.44, and 6111.45 and to enact sections 307.204, 505.266, 903.01 to 903.20, and 903.99 of the Revised Code to transfer authority to issue permits for the construction of new or modification of existing concentrated animal feeding facilities from the Director of Environmental Protection to the Director of Agriculture, to provide for the regulation of concentrated animal feeding facilities and concentrated animal feeding operations, to transfer authority to issue national pollutant discharge elimination system permits for concentrated animal feeding operations and certain other entities from the Director of Environmental Protection to the Director of Agriculture, to require certain existing concentrated animal feeding facilities to obtain review compliance certificates, and to make an appropriation.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 1511.02, 1511.021, 1511.022, 1511.07, 1511.071, 1515.08, 3745.04, 6111.03, 6111.035, 6111.04, 6111.44, and 6111.45 be amended and sections 307.204, 505.266, 903.01, 903.02, 903.03, 903.04, 903.05, 903.06, 903.07, 903.08, 903.09, 903.10, 903.11, 903.12, 903.13, 903.14, 903.15, 903.16, 903.17, 903.18, 903.19, 903.20, and 903.99 of the Revised Code be enacted to read as follows:

Sec. 307.204. (A) AS USED IN THIS SECTION:

(1) "ANIMAL UNIT," "CONCENTRATED ANIMAL FEEDING FACILITY," AND "MAJOR CONCENTRATED ANIMAL FEEDING FACILITY" HAVE THE SAME MEANINGS AS IN SECTION 903.01 of the Revised Code.

(2) "FACILITY" MEANS A PROPOSED NEW OR EXPANDED MAJOR CONCENTRATED ANIMAL FEEDING FACILITY.

(3) "IMPROVEMENT" MEANS THE CONSTRUCTION, MODIFICATION, OR BOTH OF COUNTY INFRASTRUCTURE.

(B) A PERSON WHO PROPOSES TO DO ANY OF THE FOLLOWING SHALL PROVIDE WRITTEN NOTIFICATION AS REQUIRED UNDER DIVISION (C) OF THIS SECTION TO THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY IN WHICH A FACILITY IS OR IS TO BE LOCATED:

(1) ESTABLISH A NEW MAJOR CONCENTRATED ANIMAL FEEDING FACILITY;

(2) INCREASE THE NUMBER OF ANIMAL UNITS OF DESIGN CAPACITY OF AN EXISTING MAJOR CONCENTRATED ANIMAL FEEDING FACILITY BY TEN PER CENT OR MORE IN EXCESS OF THE DESIGN CAPACITY SET FORTH IN THE CURRENT PERMIT FOR CONSTRUCTION OR MODIFICATION OF THE FACILITY OR FOR INSTALLATION OR MODIFICATION OF THE DISPOSAL SYSTEM FOR MANURE AT THE FACILITY ISSUED UNDER SECTION 903.02 OR DIVISION (J) OF SECTION 6111.03 of the Revised Code, AS APPLICABLE;

(3) INCREASE THE NUMBER OF ANIMAL UNITS OF DESIGN CAPACITY OF AN EXISTING CONCENTRATED ANIMAL



## Summary of the Second Circuit's Decision in the CAFO Litigation

The February 2003 CAFO regulations revise previous regulations from 1974 and 1976. Those regulations made changes to the NPDES regulations that define which facilities are CAFOs and included changes to the CAFO effluent guidelines, which set the technology-based limitations for CAFO NPDES permits. The 2003 revised regulations expanded the number of operations covered by the CAFO regulations to an estimated 15,500 and included requirements to address the land application of manure from CAFOs. The rule became effective April 14, 2003 and States were required to modify programs by February 2005 and develop State technical standards.

After EPA issued the 2003 regulations, petitions for judicial review were filed by CAFO industry organizations (American Farm Bureau Federation, National Pork Producers Council, National Chicken Council, and National Turkey Federation) and by environmental groups (Waterkeeper Alliance, Natural Resources Defense Council, Sierra Club, and American Littoral Society). The petitions for review, which were originally filed in several different circuit courts of appeal, were consolidated into one proceeding before the Second Circuit.

On February 28, 2005, the U.S. Court of Appeals for the Second Circuit issued its decision in Waterkeeper Alliance et al. v. EPA, 399 F.3d 486. In its decision, Second Circuit addressed a range of issues raised by the litigants. The Court both upheld many of the basic tenets of the regulations promulgated by EPA but also overturned certain sections.

### Issues Upheld

#### Land application regulatory approach and interpretation of "agricultural storm water"

The Court upheld EPA's authority to regulate, through NPDES permits, the runoff to the waters of the U.S. containing manure that CAFOs have applied to crop fields. It rejected the Industry Petitioners' claim that land application runoff must be channelized before it can be considered to be a point source discharge subject to permitting. It noted that the CWA expressly defines the term "point source" to include "any ... concentrated animal feeding operation ... from which pollutants are or may be discharged," and found that the Act "not only permits, but demands" that land application discharges be construed as discharges "from" a CAFO.

The Court also upheld EPA's determination in the CAFO rule that storm water runoff of manure from a CAFO's crop fields qualifies as "agricultural storm water," which is exempt from regulation under section 502(14) of the Act, only where the CAFO has applied the manure to its crops at rates that represent "appropriate agricultural utilization" of the manure nutrients. EPA's interpretation of the Act in this regard was reasonable, the Court found, in light of the legislative purpose of the agricultural storm water exemption and given the precedent set in an earlier Second Circuit case, Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114 (2d Cir. 1994).



### **Effluent guidelines**

The Court upheld the CAFO effluent guidelines in all respects against challenges from the environmental organizations. Three areas upheld in particular are listed below. The areas that were remanded to EPA are listed in the following section.

**Identification of best available technologies.** The Court rejected the environmental organizations' claim that when EPA chose the pollution control technologies on which to base effluent guidelines for CAFOs, the Agency did not meet its duty to identify the single CAFO with the best-performing technology. The Court found that EPA had collected extensive data on the waste management systems at CAFOs and had considered approximately 11,000 public comments on the proposed CAFO rule, and on those bases, EPA had adequately justified its selection of "best available technologies" on which to base the regulations. This includes the zero discharge requirement from production areas when there is a very large storm event.

**Ground water controls.** The Court upheld EPA's decision not to include controls in the national regulations on CAFO discharges that reach surface waters through a ground water connection. EPA had determined that because such discharges depend greatly on local geology and other site-specific factors, the need for permit controls on ground water discharges was a matter to be evaluated by the permitting agency in each individual case rather than established in a national regulation.

**Economic methodologies.** The Court upheld the financial methodologies that EPA used for determining whether the technology-based permit requirements for CAFOs set in the new effluent guidelines would be economically achievable by the industry as a whole.

## **Issues Vacated by the Court**

### **Nutrient Management Plans**

The Court vacated rule provisions that allow permitting authorities to issue permits to CAFOs without including the terms of the CAFO's Nutrient Management Plan ("NMP" or "Plan") in the permit and without the Plan being reviewed by the permitting agency and available to the public. The Court relied on provisions of the Act that authorize discharges only where NPDES permits "ensure that every discharge of pollutants will comply with all applicable effluent limitations and standards," citing CWA sections 402(a)(1), (a)(2), and (b). Because the rule allows CAFOs to write their own nutrient management plans and because those plans are not required to be reviewed by the permitting agency or made available to the public, the Court found, the rule does not ensure that each Large CAFO has developed a satisfactory Plan. The Court analogized to the Ninth Circuit's decision in Environmental Defense Center, Inc. v. EPA, 344 F.3d 832 (9<sup>th</sup> Cir. 2003), in which the Court held that the failure to require permitting authority review of storm water management plans under EPA's Phase II storm water rule violated the Act. The Court also found that the terms of the NMPs themselves are "effluent limitations" as that term is defined in the Act and therefore must be made part of the permit. In addition, the Court found that by not making the NMPs part of the permit and available to the public, the CAFO rule violated public participation requirements in sections 101(e) and 402 of the Act.



### **Duty to Apply**

The Court vacated the “duty to apply” provisions of the new CAFO rule. These provisions require all CAFOs to apply for an NPDES permit unless they can demonstrate that they have no potential to discharge. The Court found that the duty to apply, which the Agency had based on a presumption that all CAFOs have at least a potential to discharge, was invalid, because the CWA subjects only actual discharges to regulation rather than potential discharges. The Court acknowledged EPA’s strong policy considerations for seeking to impose a duty to apply – “EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution from large CAFOs, given that Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process” – but found that the Agency nevertheless lacked statutory authority to do so.

### **Issues Remanded by the Court**

The Court also remanded other aspects of the CAFO rule to EPA for further clarification and analysis:

#### **BCT effluent guidelines for pathogens**

The Court held that the CAFO rule violated the CWA because EPA had not made an affirmative finding that the BCT-based ELGs – i.e. the “best conventional technology” guidelines for conventional pollutants such as fecal coliform – do in fact represent BCT technology. The Court remanded this issue to EPA to make such a finding based on the BAT/BPT technologies EPA studied or to establish specific BCT limitations for pathogens based on some other technology.

#### **NSPS – 100-year storm standard**

The CAFO rule set the new source performance standards for swine and poultry CAFOs at a level of “absolute” zero discharge. As an alternative to meeting this standard, however, the rule allowed a CAFO in these categories to show that either (1) its production area was designed to contain all wastewater and precipitation from the 100-year, 24-hour storm, or (2) it would comply with “voluntary superior performance standards” based on innovative technologies, under which a discharge from the production area would be allowed if it was accompanied by an equivalent or greater reduction in the quantity of pollutants released to other media (e.g., air emissions). The Court found that EPA had not justified either of these alternatives in the record and that EPA had not provided adequate public participation with respect to either provision. As a result, the Court remanded these provisions to EPA to clarify, via a process that adequately involves the public, the statutory and evidentiary basis for allowing either of these alternative provisions.

#### **Water quality-based effluent limits**

The Court agreed with EPA that agricultural storm water is exempt from NPDES regulation and therefore is not subject to water quality-based effluent limitations in permits. However, the Court directed EPA to “clarify the statutory and evidentiary basis for failing to promulgate water quality-based effluent limitations for discharges other than agricultural storm water discharges, as that term is defined in 40 C.F.R. § 122.23(e),” and to “clarify whether States may develop water quality-based effluent limitations on their own.”

## Unaffected Portions of the CAFO Rule Questions and Answers

(Post 2<sup>nd</sup> Circuit Court Decision)

**Purpose:** In 2003, EPA issued permitting and effluent limitations regulations for Concentrated Animal Feeding Operations (CAFOs). These regulations were challenged by several parties in a lawsuit brought before the US Court of Appeals for the Second Circuit. On February 28, 2005, the Court announced its decision. This decision left many aspects of EPA's CAFO regulations unchanged; in other areas more information was requested, and in other areas, the regulations were vacated. EPA is currently developing revised regulations to address the Court's decision.

This Questions and Answers fact sheet is intended to highlight certain key portions of the rule that remain unchanged following Second Circuit's ruling.

### 1. What actions is EPA taking as a result of the Second Circuit's decision?

**A:** EPA is developing revisions to the CAFO regulations to correspond to the court's decision. The regulatory revision process will include publishing proposed regulations, followed by a public comment period, consideration of public comments and amendments where appropriate, and then, promulgation of final regulations. Among other things, the revised regulations will address the vacature provisions concerning the duty to apply and the permitting process for nutrient management plans.

### 2. If a CAFO had a permit at the time of the Second Circuit Court decision is it still in effect?

**A:** Yes, the conditions of final NPDES permits already issued to CAFOs by States or EPA are not directly affected by the court decision and remain enforceable until and unless the permits are modified, revoked and reissued, or terminated in accordance with State or Federal regulations.

Note: Federal regulations allow permits to be modified due to judicial decisions remanding and staying EPA promulgated regulations or effluent limitation guidelines only if requested by the permittee within 90 days of a court decision [see 40 CFR 122.62(a)(3)(ii)]

### 3. Did the definitions of an AFO and CAFO change?

**A:** No, the court's decision did not affect the definitions of an "AFO" or "CAFO" in the 2003 regulations. In addition, the definitions for "Land Application Area," "Production Area," and "Process Wastewater" in the 2003 regulations remain in effect and are unchanged.

Note: All CAFOs remain "point sources" under the CWA

Definition of "AFO" and "CAFO" - see 40 CFR 122.23(b)(1) and (2)

Definition of "Land Application Area" - see 40 CFR 122.23(b)(3)

Definition of "Production Area" - see 40 CFR 122.23(b)(8)

Definition of "Process Wastewater" - see 40 CFR 122.23(b)(7)



#### 4. Which CAFOs must apply for a permit?

A: The Second Circuit's decision invalidated the duty to apply provision in the CAFO regulations at 40 CFR 122.23(d). However, there is a duty to apply provision in the NPDES regulations at 40 CFR 122.21(a) that applies to point sources in general, including CAFOs. While the CAFO provision in section 122.23(d) would have required all CAFOs to apply for a permit, section 122.21(a) requires only a person who "discharges or proposes to discharge pollutants" to apply. The Second Circuit's decision did not invalidate section 122.21(a), nor is this provision's continued application to CAFOs inconsistent with the Court's decision (although EPA intends to remove the last sentence of section 122.21(a), which cross-references the duty to apply for CAFOs that was invalidated by the court). Therefore, under section 122.21(a), CAFOs currently are required to apply for an NPDES permit only if they discharge or propose to discharge pollutants.

It should also be noted that the definitions of both "Medium CAFO" and "Small CAFO" in the regulations include only those facilities that have an actual discharge. Thus, under section 122.21(a), all Medium and Small CAFOs must apply for a permit.

#### 5. Is there any benefit to the CAFO owner/operator to have an NPDES permit?

A: Because all discharges are prohibited from unpermitted CAFOs, NPDES permit coverage reduces CAFO operator risk and provides certainty to CAFO operators regarding activities and actions that are necessary to comply with the Clean Water Act. Compliance with the permit is deemed compliance with CWA, and thus acts as a shield under CWA 402(k). For example, NPDES permits for Large CAFOs incorporate effluent guidelines provisions, which include in certain cases an allowance for discharge during rainfall events. This allowance is not available to unpermitted CAFOs.

#### 6. If a CAFO does not discharge or propose to discharge, which, if any, parts of the CAFO regulations apply to it?

A: The CAFO must still comply with relevant requirements of the Clean Water Act. If a CAFO does not have a permit, any discharge of manure, litter or process wastewater from the 'production area' of a CAFO to a water of the United States is illegal. A discharge from the production areas includes (among other types of discharge) overflow from any containment structure under any climatic condition (either dry or wet), including chronic or catastrophic rainfall events.

As before the 2<sup>nd</sup> Circuit Court decision, any discharge of manure, litter or process wastewater not related to precipitation from a CAFO land application area' to a water of the United States is illegal in the absence of an NPDES permit. Examples include, but are not limited to:

- Discharge of litter, manure, or process wastewater directly to a water of the United States (e.g., application of liquid manure directly to a surface water)
- Dry-weather discharge due to the application of manure (e.g., gravity-induced discharge)
- Discharge of liquid manure from subsurface drains during dry-weather

EPA intends to address issues associated with precipitation related discharges from land application areas when the agency revises the CAFO rule.

**7. What happened to the “no potential to discharge” determination process?**

**A:** Under the Court’s decision vacating the duty to apply, non-discharging CAFOs no longer have to request a determination of no potential to discharge to avoid permitting.

**8. Will the permit process for CAFOs change?**

**A:** Yes, as a result of the Second Circuit’s decision, a facility-specific nutrient management plan must be submitted at the same time as the permit application or notice of intent to be covered by a general permit. However, under the regulations, NMPs are not required to be developed and implemented until December 31, 2006. In addition, all nutrient management plans must be made available for review by the public. And, after public review, the ‘terms’ of the nutrient management plan will become conditions of the permit. EPA intends to clarify the permit process in the revised regulations and/or ensuing guidance.

**9. Will the deadlines for permit applications and nutrient management plans change?**

**A:** Yes, EPA plans to change the deadlines for permit applications and nutrient management plans in the revised rule. The permit application date will be changed from February 13, 2006 to March 30, 2007. The NMP development and implementation dates will also be changed from December 31, 2006 to March 30, 2007.

EPA will be proposing a separate rulemaking to revise the CAFO compliance dates before the next compliance deadline.

**10. Will the requirements for what must be included in a Nutrient Management Plan (NMP) change?**

**A:** The requirements for what must be in an NMP will not change. CAFOs that are covered by NPDES permits must develop and implement NMPs that meet the requirements of 40CFR122.42(e) and for large CAFOs the ELG requirements of 40 CFR Part 412.

**11. Will it be possible to make changes to the nutrient management plan during the life of the permit?**

**A:** Yes, EPA plans to clarify the process for making revisions to the NMP during the term of the permit when the agency issues its rule revisions.

**12. Will any of the reporting requirements change for permitted CAFOs?**

**A:** No, CAFOs that are covered by NPDES permits must comply with all applicable recordkeeping and reporting requirements including those specified in 40 CFR 122.42(e).

**13. Did EPA’s authority to require information and monitor compliance change?**

**A:** No, EPA retains broad authority under Section 308 of the Clean Water Act to:  
– Require AFOs and CAFOs to establish and maintain records, make reports, conduct sampling, and provide information about the operation of their facilities

**14. Did EPA's authority to take enforcement actions for violations of the Clean Water Act change?**

**A:** No, EPA retains the authority under Section 309 of the Clean Water Act to enforce the CWA against the owner or operator of a CAFO who is in violation of the Act, its implementing regulations, or applicable permit requirements by:

- Issuing an administrative compliance order
- Filing an administrative civil penalty case, a civil judicial case for a civil penalty and injunctive relief, or a criminal action seeking a fine or imprisonment

**15. Has the court decision affected States' authority to enforce permit changes?**

**A:** No, States retain their authority, under applicable State law to enforce State permit program requirements:

- Where a State has adopted final regulations that are broader in scope or more stringent than federal regulations established by the May 2003 CAFO Rule as affected by the court decision, these more stringent State provisions remain enforceable as a matter of State law only.

**16. Did the citizen suit authorities under the Clean Water Act change?**

**A:** No, citizen enforcement of State regulations and permit violations are established and limited as prescribed under applicable State law. Under Section 505 of the Clean Water Act, any citizen may commence a civil action on his own behalf against:

- Any owner or operator of a CAFO alleged to be in violation of the Clean Water Act, implementing regulations, permit, or enforcement order.





## Fact Sheet: Concentrated Animal Feeding Operations Proposed Rulemaking June 2006

---

*EPA seeks comments on a proposed rule that would revise several parts of EPA's National Pollutant Discharge Elimination System (NPDES) and Effluent Limitation Guidelines for concentrated animal feeding operations (CAFOs). The proposed rulemaking is in response to the order issued in *Waterkeeper Alliance et al. v. EPA*, (2nd Cir. 2005). This proposed rule furthers the statutory goal of restoring and maintaining the nation's water quality and effectively ensuring that CAFOs properly manage manure generated by their operations.*

### **Background**

There are approximately 18,800 CAFOs in the U.S., which contribute up to sixty percent of all manure generated by operations that confine animals. Poorly managed CAFO operations may threaten water quality and public health by releasing pollutants into the environment through spills, overflows, or runoff.

EPA initially issued national effluent limitations guidelines and standards for feedlots on February 14, 1974 (39 FR 5704), and NPDES CAFO regulations on March 18, 1976 (41 FR 11458). In February 2003, EPA issued a revised rule that focused on the 5% of the nation's animal feeding operations (AFOs) that presented the highest risk of impairing water quality and public health (68 FR 7176). The revised rule expanded the number of operations covered by the CAFO regulations to an estimated 15,500 and included requirements to address the land application of manure from CAFOs. It required all Large CAFOs, and all Medium CAFOs that discharge manure, litter, or process wastewater to waters of the U.S., to apply for an NPDES permit. The rule became effective on April 14, 2003 and authorized NPDES states were required to modify their programs by February 2005 and develop state technical standards.

After EPA issued regulations in February, 2003, petitions for judicial review were filed by CAFO industry organizations and by environmental groups. The petitions for review, which were originally filed in several different circuit courts of appeal by these organizations, were consolidated into one proceeding before the Second Circuit. The Second Circuit's decision, which applies nationally, both upheld and vacated or remanded provisions of the CAFO regulations. This proposed rulemaking responds to the order issued by the Second Circuit Court of Appeals in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2nd Cir. 2005).

## **About this Regulation**

This proposal would revise several aspects of EPA's current regulations governing discharges from CAFOs. First, EPA proposes to require only CAFOs that discharge or propose to discharge to apply for a permit. However, CAFOs that land apply manure, litter or processed wastewater would not need NPDES permits if the only discharge from those facilities is agricultural stormwater. The preamble to the proposed regulation provides language describing factors that may result in discharges from CAFOs that operators should consider in determining whether to seek permit coverage.

Second, EPA proposes to require greater public participation in the issuance of an NPDES permit by requiring CAFOs seeking coverage under a permit to submit a facility-specific nutrient management plan (NMP) with their permit application or notice of intent. Permitting authorities would be required to review the plan and allow the public meaningful review and comment on it. Permitting authorities would also be required to incorporate terms of the NMP into the permits as enforceable elements. The proposed rule lays out a process for including these facility-specific provisions in general permits.

Finally, EPA is proposing to remove the 100-year, 24-hour storm containment structure standard for new large swine, poultry, and veal facilities, due to the lack of record supporting this technology, and replacing it with a zero discharge requirement. EPA proposes to clarify that WQBELs are available in permits with respect to production area discharges but are not applicable to permits for land application areas at Large CAFOs. Additionally, EPA proposes to clarify its selection of BCT for pathogens (fecal coliform), and reaffirm its decision to set the BCT limitations for fecal coliform to be equal to the Best Practicable Technology (BPT) limits established in the 2003 CAFO rule.

## **How to Get Additional Information**

For additional information visit EPA's Office of Wastewater Management web site at <http://www.epa.gov/npdes/afo/revisedrule> or contact Kawana Cohen at [cohen.kawana@epa.gov](mailto:cohen.kawana@epa.gov) or (202) 564-2345.

US ENVIRONMENTAL PROTECTION AGENCY  
1200 PENNSYLVANIA AVENUE, N.W. (MAIL CODE 4201M)  
WASHINGTON, D.C. 20460



⑤

## Code of Federal Regulations

## Title 40 - Protection of Environment

Volume: 21

Date: 2009-07-01

Original Date: 2009-07-01

Title: Section 122.23 - Concentrated animal feeding operations (applicable to State NPDES programs, see Â§ 123.25).

Context: Title 40 - Protection of Environment. CHAPTER I - ENVIRONMENTAL PROTECTION AGENCY (CONTINUED). SUBCHAPTER D - WATER PROGRAMS. PART 122 - EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM. Subpart B - Permit Application and Special NPDES Program Requirements.

**§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).**

(a) *Scope.* Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) *Definitions applicable to this section:*

(1) *Animal feeding operation* ("AFO") means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(2) *Concentrated animal feeding operation* ("CAFO") means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) The term *land application area* means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

(4) *Large concentrated animal feeding operation* ("Large CAFO"). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;

(ii) 1,000 veal calves;

(iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(iv) 2,500 swine each weighing 55 pounds or more;

- (v) 10,000 swine each weighing less than 55 pounds;
- (vi) 500 horses;
- (vii) 10,000 sheep or lambs;
- (viii) 55,000 turkeys;
- (ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;
- (x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
- (xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;
- (xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or
- (xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

(5) The term *manure* is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal.

(6) *Medium concentrated animal feeding operation* ("Medium CAFO"). The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

(i) The type and number of animals that it stables or confines falls within any of the following ranges:

- (A) 200 to 699 mature dairy cows, whether milked or dry;
- (B) 300 to 999 veal calves;
- (C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
- (D) 750 to 2,499 swine each weighing 55 pounds or more;
- (E) 3,000 to 9,999 swine each weighing less than 55 pounds;
- (F) 150 to 499 horses;
- (G) 3,000 to 9,999 sheep or lambs;
- (H) 16,500 to 54,999 turkeys;
- (I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;
- (J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
- (K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;
- (L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or
- (M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and

(ii) Either one of the following conditions are met:

- (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
- (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(7) *Process wastewater* means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.

(8) *Production area* means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(9) *Small concentrated animal feeding operation* ("Small CAFO"). An AFO that is designated as a CAFO and is not a Medium CAFO.

(c) *How may an AFO be designated as a CAFO?* The appropriate authority (*i.e.*, State Director or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.

(1) *Who may designate?*—(i) *Approved States.* In States that are approved or authorized by EPA under Part 123, CAFO designations may be made by the State Director. The Regional Administrator may also designate CAFOs in approved States, but only where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant.

(ii) *States with no approved program.* The Regional Administrator may designate CAFOs in States that do not have an approved program and in Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program.

(2) In making this designation, the State Director or the Regional Administrator shall consider the following factors:

(i) The size of the AFO and the amount of wastes reaching waters of the United States;

(ii) The location of the AFO relative to waters of the United States;

(iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;

(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and

(v) Other relevant factors.

(3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:

(i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or

(ii) Pollutants are discharged directly into waters of the United States which originate outside of the

facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(d) *Who must seek coverage under an NPDES permit?*—(1) *Permit requirement.* The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge. A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

(2) *Information to submit with permit application or notice of intent.* An application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(3) *Information to submit with permit application.* A permit application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(e) *Land application discharges from a CAFO are subject to NPDES requirements.* The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)–(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(f) *When must the owner or operator of a CAFO seek coverage under an NPDES permit?* Any CAFO that is required to seek permit coverage under paragraph (d)(1) of this section must seek coverage when the CAFO proposes to discharge, unless a later deadline is specified below.

(1) *Operations defined as CAFOs prior to April 14, 2003.* For operations defined as CAFOs under regulations that were in effect prior to April 14, 2003, the owner or operator must have or seek to obtain coverage under an NPDES permit as of April 14, 2003, and comply with all applicable NPDES requirements, including the duty to maintain permit coverage in accordance with paragraph (g) of this section.

(2) *Operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date.* For all operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, the owner or operator of the CAFO must seek to obtain coverage under an NPDES permit by February 27, 2009.

(3) *Operations that become defined as CAFOs after April 14, 2003, but which are not new sources.* For a newly constructed CAFO and for an AFO that makes changes to its operations that result in its becoming defined as a CAFO for the first time after April 14, 2003, but is not a new source, the owner or operator must seek to obtain coverage under an NPDES permit, as follows:

(i) For newly constructed operations not subject to effluent limitations guidelines, 180 days prior to the

time CAFO commences operation;

(ii) For other operations (e.g., resulting from an increase in the number of animals), as soon as possible, but no later than 90 days after becoming defined as a CAFO; or

(iii) If an operational change that makes the operation a CAFO would not have made it a CAFO prior to April 14, 2003, the operation has until February 27, 2009, or 90 days after becoming defined as a CAFO, whichever is later.

(4) *New sources.* The owner or operator of a new source must seek to obtain coverage under a permit at least 180 days prior to the time that the CAFO commences operation.

(5) *Operations that are designated as CAFOs.* For operations designated as a CAFO in accordance with paragraph (c) of this section, the owner or operator must seek to obtain coverage under a permit no later than 90 days after receiving notice of the designation.

(g) *Duty to maintain permit coverage.* No later than 180 days before the expiration of the permit, or as provided by the Director, any permitted CAFO must submit an application to renew its permit, in accordance with § 122.21(d), unless the CAFO will not discharge or propose to discharge upon expiration of the permit.

(h) *Procedures for CAFOs seeking coverage under a general permit.* (1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with § 122.28(b). The Director must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by § 122.21(i)(1), including a nutrient management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Director may request such information from the owner or operator. If the Director makes a preliminary determination that the notice of intent meets the requirements of §§ 122.21(i)(1) and 122.42(e), the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The Director must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the Director authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Director shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(2) *For EPA-issued permits only.* The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(3) Nothing in this paragraph (h) shall affect the authority of the Director to require an individual permit under § 122.28(b)(3).

(i) *No discharge certification option.* (1) The owner or operator of a CAFO that meets the eligibility criteria in paragraph (i)(2) of this section may certify to the Director that the CAFO does not discharge or propose to discharge. A CAFO owner or operator who certifies that the CAFO does not discharge or propose to discharge is not required to seek coverage under an NPDES permit pursuant to paragraph (d)(1) of this section, provided that the CAFO is designed, constructed, operated, and maintained in



accordance with the requirements of paragraphs (i)(2) and (3) of this section, and subject to the limitations in paragraph (i)(4) of this section.

(2) *Eligibility criteria.* In order to certify that a CAFO does not discharge or propose to discharge, the owner or operator of a CAFO must document, based on an objective assessment of the conditions at the CAFO, that the CAFO is designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge, as follows:

(i) The CAFO's production area is designed, constructed, operated, and maintained so as not to discharge. The CAFO must maintain documentation that demonstrates that:

(A) Any open manure storage structures are designed, constructed, operated, and maintained to achieve no discharge based on a technical evaluation in accordance with the elements of the technical evaluation set forth in 40 CFR 412.46(a)(1)(i) through (viii);

(B) Any part of the CAFO's production area that is not addressed by paragraph (i)(2)(i)(A) of this section is designed, constructed, operated, and maintained such that there will be no discharge of manure, litter, or process wastewater; and

(C) The CAFO implements the additional measures set forth in 40 CFR 412.37(a) and (b);

(ii) The CAFO has developed and is implementing an up-to-date nutrient management plan to ensure no discharge from the CAFO, including from all land application areas under the control of the CAFO, that addresses, at a minimum, the following:

(A) The elements of § 122.42(e)(1)(i) through (ix) and 40 CFR 412.37(c); and

(B) All site-specific operation and maintenance practices necessary to ensure no discharge, including any practices or conditions established by a technical evaluation pursuant to paragraph (i)(2)(i)(A) of this section; and

(iii) The CAFO must maintain documentation required by this paragraph either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(3) *Submission to the Director.* In order to certify that a CAFO does not discharge or propose to discharge, the CAFO owner or operator must complete and submit to the Director, by certified mail or equivalent method of documentation, a certification that includes, at a minimum, the following information:

(i) The legal name, address and phone number of the CAFO owner or operator (see § 122.21(b));

(ii) The CAFO name and address, the county name and the latitude and longitude where the CAFO is located;

(iii) A statement that describes the basis for the CAFO's certification that it satisfies the eligibility requirements identified in paragraph (i)(2) of this section; and

(iv) The following certification statement: "I certify under penalty of law that I am the owner or operator of a concentrated animal feeding operation (CAFO), identified as [Name of CAFO], and that said CAFO meets the requirements of 40 CFR 122.23(i). I have read and understand the eligibility requirements of 40 CFR 122.23(i)(2) for certifying that a CAFO does not discharge or propose to discharge and further certify that this CAFO satisfies the eligibility requirements. As part of this certification, I am including the information required by 40 CFR 122.23(i)(3). I also understand the conditions set forth in 40 CFR 122.23 (i)(4), (5) and (6) regarding loss and withdrawal of certification. I certify under penalty of law that this document and all other documents required for this certification were prepared under my direction or supervision and that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons directly involved in gathering and evaluating the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."; and

(v) The certification must be signed in accordance with the signatory requirements of 40 CFR 122.22.

(4) *Term of certification.* A certification that meets the requirements of paragraphs (i)(2) and (i)(3) of this section shall become effective on the date it is submitted, unless the Director establishes an effective date of up to 30 days after the date of submission. Certification will remain in effect for five years or until the certification is no longer valid or is withdrawn, whichever occurs first. A certification is no longer valid when a discharge has occurred or when the CAFO ceases to meet the eligibility criteria in paragraph (i)(2) of this section.

(5) *Withdrawal of certification.* (i) At any time, a CAFO may withdraw its certification by notifying the Director by certified mail or equivalent method of documentation. A certification is withdrawn on the date the notification is submitted to the Director. The CAFO does not need to specify any reason for the withdrawal in its notification to the Director.

(ii) If a certification becomes invalid in accordance with paragraph (i)(4) of this section, the CAFO must withdraw its certification within three days of the date on which the CAFO becomes aware that the certification is invalid. Once a CAFO's certification is no longer valid, the CAFO is subject to the requirement in paragraph (d)(1) of this section to seek permit coverage if it discharges or proposes to discharge.

(6) *Recertification.* A previously certified CAFO that does not discharge or propose to discharge may recertify in accordance with paragraph (i) of this section, except that where the CAFO has discharged, the CAFO may only recertify if the following additional conditions are met:

- (i) The CAFO had a valid certification at the time of the discharge;
- (ii) The owner or operator satisfies the eligibility criteria of paragraph (i)(2) of this section, including any necessary modifications to the CAFO's design, construction, operation, and/or maintenance to permanently address the cause of the discharge and ensure that no discharge from this cause occurs in the future;
- (iii) The CAFO has not previously recertified after a discharge from the same cause;
- (iv) The owner or operator submits to the Director for review the following documentation: a description of the discharge, including the date, time, cause, duration, and approximate volume of the discharge, and a detailed explanation of the steps taken by the CAFO to permanently address the cause of the discharge in addition to submitting a certification in accordance with paragraph (i)(3) of this section; and
- (v) Notwithstanding paragraph (i)(4) of this section, a recertification that meets the requirements of paragraphs (i)(6)(iii) and (i)(6)(iv) of this section shall only become effective 30 days from the date of submission of the recertification documentation.

(j) *Effect of certification.* (1) An unpermitted CAFO certified in accordance with paragraph (i) of this section is presumed not to propose to discharge. If such a CAFO does discharge, it is not in violation of the requirement that CAFOs that propose to discharge seek permit coverage pursuant to paragraphs (d)(1) and (f) of this section, with respect to that discharge. In all instances, the discharge of a pollutant without a permit is a violation of the Clean Water Act section 301(a) prohibition against unauthorized discharges from point sources.

(2) In any enforcement proceeding for failure to seek permit coverage under paragraphs (d)(1) or (f) of this section that is related to a discharge from an unpermitted CAFO, the burden is on the CAFO to establish that it did not propose to discharge prior to the discharge when the CAFO either did not submit certification documentation as provided in paragraph (i)(3) or (i)(6)(iv) of this section within at least five years prior to the discharge, or withdrew its certification in accordance with paragraph (i)(5) of this section. Design, construction, operation, and maintenance in accordance with the criteria of paragraph (i)(2) of this section satisfies this burden.

[68 FR 7265, Feb. 12, 2003, as amended at 71 FR 6984, Feb. 10, 2006; 72 FR 40250, July 24, 2007; 73 FR 70480, Nov. 20, 2008]



**§ 412.30      Applicability.**

This subpart applies to operations defined as concentrated animal feeding operations (CAFOs) under 40 CFR 122.23 and includes the following animals: mature dairy cows, either milking or dry; cattle other than mature dairy cows or veal calves. Cattle other than mature dairy cows includes but is not limited to heifers, steers, and bulls. This subpart does not apply to such CAFOs with less than the following capacities: 700 mature dairy cows whether milked or dry; 1,000 cattle other than mature dairy cows or veal calves.

⑥

## ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of December 1, 2016

Title 40 → Chapter I → Subchapter D → Part 124 → Subpart A → §124.2

Title 40: Protection of Environment

PART 124—PROCEDURES FOR DECISIONMAKING

Subpart A—General Program Requirements

**§124.2 Definitions.**

(a) In addition to the definitions given in §§122.2 and 123.2 (NPDES), 501.2 (sludge management), 144.3 and 145.2 (UIC), 233.3 (404), and 270.2 and 271.2 (RCRA), the definitions below apply to this part, except for PSD permits which are governed by the definitions in §124.41. Terms not defined in this section have the meaning given by the appropriate Act.

*Administrator* means the Administrator of the U.S. Environmental Protection Agency, or an authorized representative.

*Application* means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in "approved States," including any approved modifications or revisions. For RCRA, application also includes the information required by the Director under §§270.14 through 270.29 [contents of Part B of the RCRA application].

*Appropriate Act and regulations* means the Clean Water Act (CWA); the Solid Waste Disposal Act, as amended by the Resource Conservation Recovery Act (RCRA); or Safe Drinking Water Act (SDWA), whichever is applicable; and applicable regulations promulgated under those statutes. In the case of an "approved State program" appropriate Act and regulations includes program requirements.

*CWA* means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act of Federal Pollution Control Act Amendments of 1972) Public Law 92-500, as amended by Public Law 95-217 and Public Law 95-576; 33 U.S.C. 1251 *et seq.*

*Director* means the Regional Administrator, the State director or the Tribal director as the context requires, or an authorized representative. When there is no approved State or Tribal program, and there is an EPA administered program, *Director* means the Regional Administrator. When there is an approved State or Tribal program, "Director" normally means the State or Tribal director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State or Tribal program. (For example, when EPA has issued an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval; see §123.1) In such cases, the term "Director" means the Regional Administrator and not the State or Tribal director.

*Draft permit* means a document prepared under §124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a "permit." A notice of intent to terminate a permit and a notice of intent to deny a permit as discussed in §124.5, are types of "draft permits." A denial of a request for modification, revocation and reissuance or termination, as discussed in §124.5, is not a "draft permit." A "proposal permit" is not a "draft permit."

*Environmental Appeals Board* shall mean the Board within the Agency described in §1.25(e) of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in RCRA, PSD, UIC, or NPDES permit appeals filed under this subpart, including informal appeals of denials of requests for modification, revocation and reissuance, or termination of permits under Section 124.5(b). An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation does not preclude the Environmental Appeals Board from referring an appeal or a motion under this subpart to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and the rules in this subpart referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

*EPA* ("EPA") means the United States "Environmental Protection Agency."



*Facility or activity* means any "HWM facility," UIC "injection well," NPDES "point source" or "treatment works treating domestic sewage" or State 404 dredge or fill activity, or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, NPDES, or 404 programs.

*Federal Indian reservation* (in the case of NPDES) means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

*General permit* (NPDES and 404) means an NPDES or 404 "permit" authorizing a category of discharges or activities under the CWA within a geographical area. For NPDES, a general permit means a permit issued under §122.28. For 404, a general permit means a permit issued under §233.37.

*Indian Tribe* means (in the case of UIC) any Indian Tribe having a federally recognized governing body carrying out substantial governmental duties and powers over a defined area. For the NPDES program, the term "Indian Tribe" means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

*Interstate agency* means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under the "appropriate Act and regulations."

*Major facility* means any RCRA, UIC, NPDES, or 404 "facility or activity" classified as such by the Regional Administrator, or, in the case of "approved State programs," the Regional Administrator in conjunction with the State Director.

*Owner or operator* means owner or operator of any "facility or activity" subject to regulation under the RCRA, UIC, NPDES, or 404 programs.

*Permit* means an authorization, license or equivalent control document issued by EPA or an "approved State" to implement the requirements of this part and parts 122, 123, 144, 145, 233, 270, and 271 of this chapter. "Permit" includes RCRA "permit by rule" (§270.60), RCRA standardized permit (§270.67), UIC area permit (§144.33), NPDES or 404 "general permit" (§§270.61, 144.34, and 233.38). Permit does not include RCRA interim status (§270.70), UIC authorization by rule (§144.21), or any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

*Person* means an individual, association, partnership, corporation, municipality, State, Federal, or Tribal agency, or an agency or employee thereof.

*RCRA* means the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (Pub. L. 94-580, as amended by Pub. L. 95-609, 42 U.S.C. 6901 *et seq.*).

*Regional Administrator* means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

*Schedule of compliance* means a schedule of remedial measures included in a "permit," including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the "appropriate Act and regulations."

*SDWA* means the Safe Drinking Water Act (Pub. L. 95-523, as amended by Pub. L. 95-1900; 42 U.S.C. 300f *et seq.*).

*Section 404 program or State 404 program or 404* means an "approved State program" to regulate the "discharge of dredged material" and the "discharge of fill material" under section 404 of the Clean Water Act in "State regulated waters."

*Site* means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

*Standardized permit* means a RCRA permit authorizing management of hazardous waste issued under subpart G of this part and part 270, subpart J. The standardized permit may have two parts: A uniform portion issued in all cases and a supplemental portion issued at the Director's discretion.

*State* means one of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands (except in the case of RCRA), the Commonwealth of the Northern Mariana Islands, or an Indian Tribe that meets the statutory criteria which authorize EPA to treat the Tribe in a manner similar to that in which it treats a State (except in the case of RCRA).

*State Director* means the chief administrative officer of any State, interstate, or Tribal agency operating an approved program, or the delegated representative of the State director. If the responsibility is divided among two or more States, interstate, or Tribal agencies, "State Director" means the chief administrative officer of the State, interstate, or Tribal agency authorized to perform the particular procedure or function to which reference is made.

*State Director* means the chief administrative officer of any State or interstate agency operating an "approved program," or the delegated representative of the state Director. If responsibility is divided among two or more State or interstate agencies, "State Director" means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

*UIC* means the Underground Injection Control program under Part C of the Safe Drinking Water Act, including an "approved program."

(b) For the purposes of part 124, the term *Director* means the State Director or Regional Administrator and is used when the accompanying provision is required of EPA-administered programs and of State programs under §§123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA). The term *Regional Administrator* is used when the accompanying provision applies exclusively to EPA-issued permits and is not applicable to State programs under these sections. While States are not required to implement these latter provisions, they are not precluded from doing so, notwithstanding use of the term "Regional Administrator."

[48 FR 14264, Apr. 1, 1983; 48 FR 30115, June 30, 1983, as amended at 49 FR 25981, June 25, 1984; 53 FR 37410, Sept. 26, 1988; 54 FR 18785, May 2, 1989; 57 FR 5335, Feb. 13, 1992; 57 FR 60129, Dec. 18, 1992; 58 FR 67983, Dec. 22, 1993; 59 FR 64343, Dec. 14, 1994; 65 FR 30910, May 15, 2000; 70 FR 53449, Sept. 8, 2005]

---

[Need assistance?](#)



## RESEARCH OUTLINE

# Regulation of Concentrated Animal Feeding Operations under the Federal Clean Water Act

### Introduction

Agricultural animal feeding operations come in all shapes, sizes and configurations. A point of controversy surrounding such operations is how to determine which ones to designate as a "concentrated animal feeding operation", or "CAFO", because the term in the legal context is a term of art used in the body of the federal Clean Water Act (the Act). 33 U.S.C. Secs. 1251 *et seq.* The term is important in its legal context because it appears as an example of what Congress thought should be regulated as a potential "point source" of pollutants to the nation's waterways.

Much of the current debate surrounding regulation of agricultural contributions of pollutants to water centers on whether a specific contribution involves what is known as a point source because the amount of regulation applied to an agricultural producer under the Act varies depending on whether a point source is present. Point sources have a number of important regulatory distinctions, one being that a point source cannot discharge pollutants without first obtaining a National Pollution Discharge Elimination System (NPDES) permit. 33 U.S.C. Secs. 1311 (a). In addition, private citizens may commence "citizen suits" against any person "alleged to be in violation of" the conditions of an effluent standard or limitation. 33 U.S.C. Secs. 1365 (a) (1).

### Point Source

The Act defines "point source," includes concentrated animal feeding operation in the list of what it considers to be point sources, but does not define the term concentrated animal feeding operation. 33 U.S.C. Secs. 1362 (14). The definition in the Act identifies two basic distinguishing characteristics: 1) a point source is a conveyance, and 2) a point source must have a potential for a discharge of pollutants.

The Act lists examples of point sources and specifically includes the term "concentrated animal feeding operation," but does not describe the distinguishing characteristics of an animal operation that would make it the concentrated animal feeding operation that is to be treated as a point source under the law. 33 U.S.C. Secs. 1362 (14).

The Act also states that agricultural storm water discharges and return flows from irrigated agriculture are not to be regulated as point sources. 33 U.S.C. Secs. 1362 (14). Since those items are often related to and sometimes inextricably intertwined with animal operations, their statutory exemption from regulation as point sources sets up a dynamic in this area.

## Current Regulation of Concentrated Animal Feeding Operations

The Environmental Protection Agency (EPA) has defined the term "concentrated animal feeding operation" in its current rules. See 40 C.F.R. Secs. 122.23 and 40 C.F.R. Pt. 122, App. B. Under the current EPA regulations, an operation must first be an animal feeding operation (AFO) before it can be a concentrated animal feeding operation (CAFO). To be an AFO, an operation must be a lot or facility where animals have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period; and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

The current EPA regulations provide that an AFO can become a CAFO in either of three ways:

1. Some AFOs are CAFOs because of their size – If an AFO has more than 1000 animal units (AU) it is a CAFO;
2. Some AFOs are CAFOs because of size and the presence of a "discharge" – If an AFO has more than 300 AU it is a CAFO if either pollutants are discharged into navigable waters through a manmade ditch, flushing system, or similar man-made device, or pollutants are discharged directly into waters that either originate outside of and pass over, across, or through the facility, or come into direct contact with the confined animals;
3. An AFO can be designated as a CAFO because it is a significant contributor of pollution -- The EPA may designate an operation with more than 300 animal units as a CAFO if the facility "is a significant contributor of pollution to the waters of the United States" or if the facility "is a significant contributor of pollution to the waters of the United States" and either pollutants are discharged into navigable waters through a manmade ditch, flushing system, or similar man-made device, or pollutants are discharged directly into waters that originate outside of and pass over, across, or through the facility or come into direct contact with the confined animals.

The regulations provide further that the Director, in making such a designation, shall consider size, location relative to waters and "the means of conveyance." At this point the regulations contain the following statement. "Provided, however, that no animal feeding operation is a concentrated animal feeding operation as defined above if such animal feeding operation discharges only in the event of a 25 year, 24 hour storm event."

According to EPA's current rules, the term "animal unit" means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms (approximately 55 pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0. 40 C.F.R. Pt. 122, App. B.

## NPDES Permits

Under current EPA regulations, if an operation is a CAFO it is a point source and therefore cannot discharge unless it has an (NPDES) permit. 40 C.F.R. Secs. 122.23 (a). NPDES permits define specific discharge or effluent limits derived through the consideration of two factors:

- a) technology-based effluent limitations that must be both economically achievable and technologically attainable through the operation of control technologies and process changes, and
- b) water quality-based effluent limitations that are set to meet regional or site-specific water quality standards.



## Effluent Limitation Guidelines (ELG)

The EPA has established effluent limitations guidelines for NPDES permits associated with concentrated animal feeding operations to assist in developing NPDES permits.

The current ELG for CAFOs apply only to those with more than 1000 animal units (AU) and provide guidance on technology-based effluent limitations. See 40 C.F.R. Secs, 412.10

The current ELG establish a restriction and an exception for NPDES permits granted to concentrated animal feeding operations. See 40 C.F.R. Secs, 412.12 and 40 C.F.R. Secs, 412.13 (Note that special ELG are established for ducks. See 40 C.F.R. Secs, 412.20.) There must be no discharge of process wastewater pollutants to navigable waters except when chronic or catastrophic storm events cause an overflow from a facility designed, constructed and operated to hold process-generated wastewater plus runoff from a 10-year, 24 hour rainfall event for best practicable control technology currently available and a 25-year, 24 hour rainfall event for the best available technology economically achievable.

## Best Professional Judgment

Best professional judgement is also used in developing NPDES permits for concentrated animal feeding operations. Given the current effluent limitations guidelines, the permit writer must use Best Professional Judgment (BPJ) to determine the appropriate technology-based effluent limitations for CAFOs with 1000 or fewer AU. The permit writer must also use BPJ to develop more stringent effluent limitations where technology-based effluent limitations are not sufficient to meet water quality standards for CAFOs of any size.

## Changes

Rules, regulations and statutes are always subject to change. The location of the Environmental Protection Agency Web page is <http://www.epa.gov/> and often contains information on current rules and regulations as well as proposed rules or program changes. Locations to view federal statutory law and federal rules and regulations are <http://www4.law.cornell.edu/uscode/> and <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html/>, respectively.

## Federal Cases

A search of federal cases involving concentrated animal feeding operations reveals minimal development of judicial interpretation in this area. Two federal Circuit Court cases are highlighted here:

- In *Carr v. Alta Verde Indus.*, 931 F.2d 1055 (5th Cir. 1991), Plaintiff sought civil penalties and injunctive relief for violations of the Clean Water Act against a cattle feedlot with between (b) (6) 0 head of cattle on 230.9 acres. Waste drained into a system of six holding ponds. The water was used to irrigate and fertilize adjacent fields. The district court dismissed the case for lack of standing reasoning that no violations were likely in the future because the defendant fit the 25 year, 24 hour, storm event criteria in the effluent limitation guidelines for CAFOs. The circuit court ruled that the effluent limitation guidelines do not create an exception to the NPDES permit requirement.

- In *Concerned Area Residents v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994), Plaintiffs sued the defendant dairy operation under federal and state laws including the Clean Water Act over their liquid manure spreading operations. The dairy managed (b) (6) head of cows, heifers and calves. The circuit court ruled that if the farm itself is a CAFO the associated liquid manure spreading operation is a point source within the meaning of the Clean Water Act. The court also ruled that the liquid manure operation is not protected from designation as a point source by the agricultural storm water discharges exception under the Act.

## Bibliography

Readers are cautioned that the precedent value and the relevance of a particular case with respect to a question of law are a matter of legal interpretation. The following are included without judgement as to their relevance or value as precedent. They are included solely as information and a reference point for further individual research and study.

### Federal Appellate Decisions

*Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055 (5th Cir. 1991)

*Concerned Area Residents v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994)

*Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998)

### Federal District Court Decisions

*American Canoe Ass'n, Inc. v. (b) (6) Farms, Inc.*, No. 7:98-CV-4-F (1), No. 7:98-CV-19-F (1), No. 5:98-CV-209-F (1), 1998 U.S. Dist. LEXIS 21402 (E.D. N.C. Dec. 21, 1998)

*Citizens Legal Envtl. Action Network v. Premium Std. Farms*, No. 97-6073, 2000 U.S. Dist. LEXIS 1990 (W.D. Mo. Feb. 23, 2000)

*Community Ass'n for Restoration of the Env't. v. (b) (6) Dairy*, 65 F. Supp.2d 1129 (E.D. Wash. 1999)

*Community Ass'n for Restoration of the Env't. v. (b) (6) Dairy*, 54 F. Supp.2d 976 (E.D. Wash. 1999)

*Concerned Area Residents v. Southview Farm*, 834 F. Supp. 1410 (W.D. N.Y. 1993)

*Concerned Area Residents v. Southview Farm*, 834 F. Supp. 1422 (W.D. N.Y. 1993)

*Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563 (N.D. Tex. 1997)

*Higbee v. Starr*, 598 F. Supp. 323 (W.D. Ark. 1984)

*Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534 (D. Or. 1996)

*(b)(6) Farms, Inc. v. Board of Supervisors*, 23 F. Supp.2d 663 (N.D. Miss. 1998)

*Save the Valley, Inc. v. United States EPA*, 99 F. Supp.2d 981 (S.D. Ind. 2000)

*Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, No. 96-657, 1997 U.S. Dist. LEXIS 16458 (D. Or. Sept. 23, 1997)

*United States v. Conagra, Inc.*, No. 96-0134, 1997 U.S. Dist. LEXIS 21401 (D. Idaho Dec. 31, 1997)

*Weber v. Trinity Meadows Raceway, Inc.*, No. 4:92-CV-267-Y, 1996 U.S. Dist. LEXIS 15302; 42 ERC (BNA) 2063 (N.D. Tex. June 20, 1996)

*This outline was prepared in October, 2000.*

*This material is based on work supported by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions or recommendations expressed in this article are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.*

NCALRI is a federally funded research institution located at the University of Arkansas School of Law  
Web site: [www.NationalAgLawCenter.org](http://www.NationalAgLawCenter.org) • Phone: (479)575-7646 • Email: [NCALRI@uark.edu](mailto:NCALRI@uark.edu)



8

903.02 or division (J) of section 6111.03 of the Revised Code, as applicable, and to a design capacity of more than ten thousand animal units.

(C) The person shall notify the board in writing by certified mail of the proposed construction or expansion of the facility and include the following information:

- (1) The anticipated travel routes of motor vehicles to and from the facility;
- (2) The anticipated number and weights of motor vehicles traveling to and from the facility.
- (D) At the request of the board, the county engineer may review the written notification and advise the board on both of the following:
  - (1) Improvements and maintenance of improvements that are reasonably needed in order to accommodate the impact on township infrastructure that is anticipated as a result of the facility, including increased travel or the types of vehicles on township roads;
  - (2) The projected costs of the improvements and maintenance.

Not later than ten days after receiving the written notification, the board may request the person to provide additional reasonable and relevant information regarding the impact of the facility on township infrastructure. The person shall provide the information not later than ten days after the request is made.

(E)(1) Not later than thirty days after the initial written notification is received by the board, the board shall submit to the person its recommendations, if any, concerning the improvements that will be needed as a result of the facility and the cost of those improvements.

(2) Not later than fifteen days after receipt of the board's recommendations, the person shall notify the board either (a) that the person agrees with the recommendations and will implement them or that the person is submitting alternative recommendations or modifications to the board. If the person agrees with the recommendations, they shall be considered to be the board's final recommendations.

(3) If the board receives alternative recommendations or modifications under division (E)(2) of this section, the board shall select final recommendations and submit them to the person not later than thirty days after the receipt of the alternative recommendations or modifications.

(F) The board shall prepare a written, dated statement certifying that the written notification required under this section was submitted and that final recommendations were selected regarding needed improvements and the costs of those improvements. The board shall provide the person with the original of the statement so that the person can include it with the application for a permit to install for the facility as required under division (C)(4) of section 903.02 of the Revised Code. The board shall retain a copy of the statement for its records.

(G) The person shall construct, modify, and maintain or finance the construction, modification, and maintenance of improvements as provided in the board's final recommendations and with the approval and oversight of the county engineer. If the person fails to do so, the board shall notify the person by certified mail that the board intends to initiate mediation with the person if the person remains out of compliance with the final recommendations.

The board shall allow sufficient time for the person to apply for and proceed to obtain, for the purpose of financing the construction, modification, or maintenance of the improvements, exemptions from taxation under sections 5709.63, 5709.632, 5709.73, and 5709.78 of the Revised Code or state or federal grants that may be available.

If the person remains out of compliance with the final recommendations, the board may initiate mediation with the person in order to resolve any differences between them. If mediation fails to resolve the differences, the board and the person first shall attempt to resolve the differences through any legal remedies before seeking redress through a court of common pleas.

(H) If the person subsequently submits an application under section 903.02 of the Revised Code for a permit to install the facility, or if the routes or travel to or from the facility change for any reason other than road construction conducted by the township, the board or the person may request that additional information be provided in writing and shall proceed as provided in this section for the notification and recommendation proceedings.

#### **Sec. 903.01. As used in this chapter:**

**(A) "AGRICULTURAL ANIMAL" MEANS ANY ANIMAL GENERALLY USED FOR FOOD OR IN THE PRODUCTION OF FOOD, INCLUDING CATTLE, SHEEP, GOATS, RABBITS, POULTRY, AND SWINE; HORSES; AND ANY OTHER ANIMAL INCLUDED BY THE DIRECTOR OF agriculture by rule.**

**(9) "Animal feeding facility" means a lot, or building, or structure where both of the following conditions are met:**

- (1) Animals, other than aquatic animals, have been, are, or will be stabled or confined and fed or maintained there for a total of forty-five days or more in any twelve-month period.**
- (2) Crops, vegetative forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot, building, or structure.**

**"ANIMAL FEEDING FACILITY" ALSO INCLUDES LAND THAT IS OWNED OR LEASED BY THE OWNER OR OPERATOR OF**

THE LOT, BUILDING, OR STRUCTURE AND ON WHICH MANURE ORIGINATING FROM THE LOT, BUILDING, OR STRUCTURE IS APPLIED. "ANIMAL FEEDING FACILITY" DOES NOT INCLUDE A HATCHERY, FISH FARM, OR OTHER FACILITY THAT RAISES AQUATIC ANIMALS.

Two or more animal feeding facilities under common ownership shall be considered to be a single animal feeding facility for the purposes of this chapter if they adjoin each other or if they use a common area or system for the disposal of wastes.

(C) "Animal unit" means a unit of measurement calculated by adding the following numbers:

- (1) The number of slaughter and feeder cattle multiplied by one;
- (2) The number of mature dairy cattle whether milked or dry multiplied by one and four-tenths;
- (3) The number of swine each weighing over fifty-five pounds multiplied by four-tenths;
- (4) The number of horses multiplied by two;
- (5) The number of sheep or lambs multiplied by one-tenth;
- (6) The number of turkeys multiplied by two-hundredths;
- (7) The number of laying hens or broilers multiplied by one-hundredth;
- (8) The number of ducks multiplied by two-tenths.

(D) "Best management practices" means best management practices established in rules.

(E) "Concentrated animal feeding facility" means an animal feeding facility with a total design capacity of more than one thousand animal units.

(F) "CONCENTRATED ANIMAL FEEDING OPERATION" HAS THE SAME MEANING AS IN REGULATIONS ADOPTED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY UNDER THE FEDERAL WATER POLLUTION CONTROL ACT.

(G) "Discharge" means to add from a point source to waters of the state.

(H) "Federal Water Pollution Control Act" means the "Federal Water Pollution Control Act Amendments of 1972," 86 Stat. 816, 33 U.S.C. 1251 et. seq., as amended, and regulations adopted under it.

(I) "Finalized," with respect to the programs required under division (A)(1) of section 903.02 and division (a)(1) of section 903.03 of the Revised Code, means that all rules that are necessary for the administration of this chapter have been adopted and all employees of the department of agriculture that are necessary for the administration of this chapter have been employed.

(J) "General permit" has the meaning that is established in rules.

(K) "Individual permit" has the meaning that is established in rules.

(L) "Installation permit" means a permit for the installation or modification of a disposal system or any part of a disposal system issued by the director of environmental protection under division (J)(1) of section 6111.03 of the Revised code.

(M) "Major concentrated animal feeding facility" means a concentrated animal feeding facility with a total design capacity of more than ten thousand animal units.

(N) "Manure" means ANY OF THE FOLLOWING WASTES USED IN OR RESULTING FROM THE PRODUCTION OF AGRICULTURAL ANIMALS OR DIRECT AGRICULTURAL PRODUCTS SUCH AS MILK OR EGGS: animal excreta, discarded products, bedding, process waste water, process generated waste water, waste feed, sludge drainage, and compost products resulting from mortality composting or the composting of animal excreta.

(O) "Manure storage or treatment facility" means any excavated, diked, or walled structure or combination of structures designed for the biological stabilization, holding, or storage of manure.

(P) "Mortality composting" means the controlled decomposition of organic solid material consisting of dead animals that stabilizes the organic fraction of the material.

(Q) "NPDES permit" means a permit issued under the national pollutant discharge elimination system established in section 402 of the Federal Water Pollution Control Act and includes the renewal of such a permit. "NPDES permit" includes the federally enforceable provisions of a permit to operate into which NPDES permit provisions have been incorporated.

(R) "Permit" includes an initial, renewed, or modified permit to install, permit to operate, NPDES permit, and installation permit unless expressly stated otherwise.

(S) "Permit to install" means a permit issued under section 903.02 of the Revised code.



9

NOV 08 2007

WN-16J

Robert J. Boggs, Director  
Ohio Department of Agriculture  
8995 East Main Street  
Reynoldsburg, Ohio 43068-3399

Dear Mr. Boggs:

I am writing in response to former Governor Taft's December 28, 2006, letter, in which the State of Ohio asked the U.S. Environmental Protection Agency, Region 5, to approve the transfer of National Pollutant Discharge Elimination System (NPDES) authority for concentrated animal feeding operations (CAFOs) from the Ohio Environmental Protection Agency (Ohio EPA) to the Ohio Department of Agriculture (ODA). The submittal included a program description, an Attorney General's statement, supporting statutes and regulations, a draft Memorandum of Agreement between ODA and EPA Region 5, and supporting documentation.

EPA is committed to working with the State as it seeks to transfer NPDES authority for CAFOs to ODA, and to ensure that the program is not disrupted during the transfer process. In April 2007, we provided an initial response to ODA, expressing four specific concerns regarding ODA's standards for land application of manure, litter, and process wastewater, and indicating that these concerns must be resolved, or they may prevent EPA from approving the revised program. ODA still must resolve these concerns. We also provided additional questions regarding ODA's land application standards, which ODA answered in a June 2007 letter. Thank you for your answers.

EPA Region 5 has been working with EPA Headquarters on a comprehensive review of the remainder of Ohio's application. Our review has identified an additional concern regarding application of manure on snow or frozen soil. Please see section II of the enclosure. In addition, certain aspects of ODA's statutory and regulatory authority do not appear to be consistent with federal regulations. We are therefore seeking clarification or revisions with respect to ODA's authority to regulate CAFOs to the extent required by the federal regulations. For each topic raised in section I of the enclosure, ODA will need to either revise the relevant provision or element of the application, or provide clarification as to the adequacy of its current authority.

Thank you for the opportunity to review Ohio's revised program. Once you have had an opportunity to review the enclosure, please have your staff contact Matt Gluckman, CAFO Coordinator, at (312) 886-6089 to discuss these issues, or feel free to contact me directly.

Sincerely yours,

151/ROT

Robert D. Tolpa  
Acting Director, Water Division

Enclosure

cc: Chris Korleski, Director, Ohio EPA  
Marc Dann, Ohio Attorney General  
Mr. Kevin Elder, ODA  
Mr. George Elmaraghy, Ohio EPA

bcc: Ms. Linda Boornazian, OWM  
Ms. Allison Weideman, OWM-Permits Division  
Mr. George Utting, OWM- Permits Division  
Mr. Louis Eby, OWM- Permits Division  
Michael Berman, CA-14J  
Gary Prichard, CA-14J  
Timothy Henry, WD-15J  
Peter Swenson  
Steven Jann  
Matt Gluckman

G:NPDES/comment letter on ODA submittal 1107/M/Gluckman/11/16/07

**EPA Comments on the Ohio Department of Agriculture's December 28, 2006  
Application for NPDES Program Authority for Concentrated Animal Feeding  
Operations**

**I. Comments**

**A. Statutory authority**

1. Scope of ODA's authority to regulate discharged pollutants. The Clean Water Act prohibits the unauthorized discharge of "pollutants," which are defined in §502(6) as

"dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water. . ."

ODA's regulations purport to give the ODA Director authority to regulate "pollutants." However, ODA's statutory authority appears to be limited to regulation of manure, CAFO-related process/process-generated wastewater, and storm water. As a result, ODA does not appear to have the statutory authority to regulate the discharge of pollutants beyond those within the definition of manure and storm water, such as might be introduced from a co-located facility, or into a CAFO from a commercial or industrial source (e.g., a food processor). Ohio will need to revise ODA's authority to enable ODA to address such situations, or specify the State's current authority to do so, including which State agency or department has authority to administer the authorizing statute.

2. ORC 903.10(C) and (F) require ODA to adopt rules that, among other things, establish (1) best management practices (BMPs) which govern the storage, transportation, and land application of manure and (2) terms and conditions to be included in a permit, including, as applicable, BMPs. The statute defines BMPs as practices established in rules. ORC 903.01(C).

Chapter 901 of the OAC specifies a number of BMPs that govern the storage, transportation, and land application of manure. *See, for example, OAC 901:10-2-14.* At the same time, it requires ODA to establish NPDES permit conditions, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the Federal Water Pollution Control Act (FWPCA) and regulations thereunder including, but not limited to 40 CFR 122.44. Paragraph (k) in 122.44 requires NPDES permits to include BMPs under certain circumstances. While the paragraph does not specify the BMPs required in each instance, it does establish expectations for the outcomes that the practices must achieve.

It appears that the ORC may require ODA to establish a specific BMP in the OAC before ODA will have authority to impose the practice as a condition in an NPDES permit. Please specify ODA's authority for setting a specific BMP in a permit, when such a BMP does not exist in ODA rules.

3. Terms and conditions of permits. ORC 903.08(G) states that, in establishing the terms and conditions of an NPDES permit the director, to the extent consistent with the FWPCA, shall consider technical feasibility and economic costs and shall allow a reasonable period of time for coming into compliance with the permit. For Large CAFOs, EPA already accounted for technical feasibility and economic costs when it developed the Effluent Limitations Guidelines and New Source Performance Standards for the CAFO Point Source Category, and except for limited opportunities for variances from technology-based standards, ODA would not be able to consider these factors further in establishing effluent limitations. For Medium and Small CAFOs, and for land application under the control of Large horse, sheep and duck CAFOs for which EPA has not established technology-based standards, these factors may be considered in setting Best Professional Judgment-based limitations to the extent consistent with 40 CFR 125.3(d). However, these factors are not relevant in setting water quality-based effluent limitations, although they may be relevant outside of the permitting context in evaluating the water quality standards upon which such limitations are based in accordance with Section 303(c) of the Clean Water Act. With respect to compliance schedules, such schedules would be available in establishing water quality-based effluent limits to the extent authorized by EPA requirements and where the State's water quality standards clearly authorize the use of such schedules, but would not otherwise be available in setting water quality-based effluent limitations. Please confirm that use of the factors referenced in Subpart (G) would be limited consistent with federal requirements identified above for the purpose of establishing NPDES permit conditions.
4. Public Participation. Public participation and notice are required elements of the NPDES program, see, CWA §402(b)(3); 40 CFR 123.25. ORC 903.09 and OAC 901:10-6 establish public participation requirements for ODA to follow in the issuance of NPDES permits. ORC 903.09(E) and OAC 901:10-6-01(C) address situations where the Director fails to provide adequate notice or to provide for a public meeting. It appears that these provisions may authorize inadequate notice, or limit opportunities for public hearings. Ohio will need to revise or delete ORC 903.09(E) and OAC 901:10-6-01(C), or specify how ODA's authority to provide public participation consistent with the federal requirements would be retained, in light of these provisions.
5. Conflict of Interest. ORC 903.081 addresses the effect of receipt of income from permittees or applicants for permits. The focus of this provision is on whether a person may take a *specific action* (i.e., issue, vacate, modify) on an NPDES permit during a two year period from receiving significant income from an NPDES permittee or permit applicant. Under 40 CFR 123.25(c), persons who



have received a significant portion of their income from an NPDES permittee or applicant *may not serve* on such boards or bodies. The federal provision specifically includes “any individual, including the Director, who has or shares the authority to approve all or portions of permits either in the first instance as modified or reissued, or on appeal.” While the Statement of Legal Authority indicates on page 127 that the ODA program has identical conflict of interest provisions as the federal requirements, the State statutory provision appears to be narrower than the federal provision. The State’s conflict of interest authority will need to be revised consistent with the federal requirement.

6. Denial of request for permit modification. 40 CFR 124.5(b) requires a state implementing a permitting program to provide a written response denying a request for a permit modification to interested parties as well as to owners and operators. ORC 903.09(F) only covers such notice to owners and operators, and thus appears to be narrower than the federal requirement. Ohio will need to revise its authority to ensure that written responses to denials of requests for permit modification will be provided to interested parties other than CAFO owners or operators, or specify the provisions which establish that requirement.
7. Designation authority. ORC 903.10(F)(1) requires ODA to adopt rules that designate concentrated animal feeding operations which are subject to NPDES permit requirements. It provides that this designation “shall include only those point sources for which the issuance of NPDES permits is required under the [FWPCA].” Under the federal NPDES program, AFOs meeting the definition of “Large CAFO” and certain AFOs meeting the definition of “Medium CAFO” are defined as point sources, § 502(14) of the CWA and 40 CFR 122.23(a). These CAFOs require permits for discharges and proposed discharges. 40 CFR 122.21. Other AFOs are not defined as point sources. They do not require permits as a general matter. However, federal regulations provide that the Director may designate an AFO as a CAFO under certain circumstances. 40 CFR 122.23(c). Under the federal program, the designation of an AFO as a CAFO is a discretionary action; there is nothing in the FWPCA or regulations which compel the Director to require an AFO that is not defined as a CAFO to obtain a permit. As discussed on page 21 of the Statement of Legal Authority, OAC 901:10-3-07 appears to provide a designation procedure identical to that provided under 40 CFR 122.23(c). However, it appears that the language in ORC 903.10(F)(1) highlighted above potentially limits ODA’s designation authority. Ohio needs to either revise or clarify its authority so ODA can designate AFOs as CAFOs to the same extent as under the federal regulations.

#### **B. Regulatory authority**

8. Definition of nonpoint source. Rule 901:10-1-01(LLLL) defines nonpoint source pollution to mean any source of pollutants other than those defined as point sources. It provides that nonpoint sources include but are not limited to direct wet and dry deposition and overland runoff.

This definition appears to improperly exclude direct wet and dry deposition and overland runoff from the scope of ODA's proposed NPDES program. Ohio needs to strike the second sentence from the definition or clarify that the sentence does not have the effect of excluding the following from the ODA program:

- a. Uncollected and unchannelized additions of pollutants that flow over land to which a CAFO owner or operator has applied manure, litter, or process wastewater. Please note that the Second Circuit Court of Appeals rejected a claim that such discharges are excluded from the scope of the federal NPDES program. See *Waterkeeper Alliance, et al., v. EPA*, 399 F.3d 510, 511 (2<sup>nd</sup> Cir. 2005).
  - b. Overland runoff from the production area at an AFO that is defined or designated as a Large CAFO, a Medium CAFO, or a Small CAFO. Please note that overland runoff from production areas at Large CAFOs is included within the scope of the federal NPDES program, as is overland runoff from Medium CAFOs and Small CAFOs where such runoff discharges directly to waters of the United States which originate outside of and pass over, across, or through the facility (production area).
  - c. Process wastewater discharges that result from direct wet or dry deposition of manure, as the term is defined in 40 CFR 122.23(b)(5), originating from a CAFO production area. Please note that process wastewater discharges from production areas including, but not limited to, precipitation that has come into contact with raw materials, products, or byproducts including manure, litter, feed, milk, eggs, or bedding, is included within the scope of the federal NPDES program. 40 CFR 122.23(b)(7), 122.23(e), 68 *Federal Register* 7198, February 12, 2003.
9. Based on the language in OAC 901:10-1-02(A)(2) and ODA's Program Description, it is our understanding that CAFOs would need to have both a permit to operate (PTO) and an NPDES permit, and that the NPDES provisions would be incorporated into, and specified in the PTO. Understanding of this dual permitting approach is critical to understanding how ODA intends to regulate CAFOs. For readers not familiar with this structure, however, use of terms such as Concentrated Animal Feeding Facility (CAFF), Major Concentrated Animal Feeding Facility (MCAFF) and the interrelationship between PTOs and NPDES permits may not be clear. Please provide, perhaps in the Program Description, further clarification as to the relationship between PTOs and NPDES permits. In particular, are there facilities that would be required to obtain PTOs but not NPDES permits, or visa versa, and which types of facilities would be in those categories?

10. OAC 901:10-1-02(A)(2) states, “the term NPDES permit, NPDES operation, and concentrated animal feeding operation is an animal feeding facility that is subject to the NPDES permit as established in section 402 of the Act . . . .” The intent of this provision appears to be to establish that where the regulations use the terms NPDES permit, NPDES operation and CAFO, they refer to the portion of a PTO dealing with NPDES, and recognize that the NPDES language will be in PTOs. As written, however, this provision could be read as defining CAFOs as only those facilities with NPDES permits. The term “NPDES operation” is also not defined in the state regulations. Please clarify the intent of this provision, and whether the use of “NPDES operation” is creating a new regulatory term.
11. Bases for permit modifications. OAC 901:10-1-09 does not appear to require permit modification in the circumstances described in 40 CFR 122.62(a)(6), (7), (8), (10), (11), (12), or (16). ODA will need to revise its regulations to include those provisions relevant to CAFOs or clarify its authority to modify permits consistent with the listed causes.
12. Sampling and analysis. OAC 901:10-2-4(A) and 901:10-2-10 provide that manure shall be sampled and analyzed in accordance with certain requirements<sup>2</sup>. Paragraph (B) in OAC 901:10-2-04 and paragraph (A) in OAC 901:10-2-10 provide exceptions to the sampling and analysis requirements. While the exception in OAC 901:10-2-10(A) applies only when a person applies for a permit to install or requests approval of an operational change in accordance with OAC 901:10-1-09, the exception in OAC 901:10-2-04(B) appears to be expressed without qualification. ODA will need to revise OAC 901:10-2-04(B) or clarify that the exception established therein is limited to the circumstances provided in OAC 901:10-2-4(A).
13. Additional requirements for an NPDES permit application. OAC 901:10-3-01(E) states: “In establishing terms and conditions of the NPDES permit, the director, to the extent consistent with the Federal Water Pollution Control Act, shall consider technical feasibility and economic costs and shall allow a reasonable period of time for coming into compliance with the permit.” See also, OAC 901:10-3-10(A). This provision raises the same questions as comment 3 above, regarding ORC 903.08(G). Please confirm that use of the factors referenced in Subpart (E) would be limited consistent with federal requirements identified in comment 3 for the purpose of establishing NPDES permit conditions.
14. Defined Terms Relating to Who Needs to Apply for NPDES Permit. OAC 901:10-3-02(B) states that an animal feeding operation is defined as a concentrated animal feeding operation *only* if the specific threshold specified in division (M) of section 903.01 of the Revised Code [for Large CAFOs] is met for any one animal species. It also states that “concentrated animal feeding operation” *may* also mean any animal feeding facility that meets the criteria of

---

<sup>2</sup> For comparison purposes, 40 CFR § 412.4(c)(3) requires Large CAFOs in the cattle, swine, and poultry subcategories to analyze manure samples for nitrogen and phosphorus content a minimum of once per year.

division (Q) [Medium CAFOs] or division (EE) of section 903.01 [Small CAFOs] of the Revised Code. Use of the terms such as “only” and “may” in this provision appear to qualify the requirement for CAFOs to seek NPDES permits, although it appears from ORC 903.01(F) and OAC 901:10-3-01(A) that all CAFOs are required to get permits to the same extent as the federal requirements. ODA will need to revise OAC 901:10-3-02(B) to ensure that CAFOs are required to seek NPDES permits to the extent required under the federal regulations, or clarify that the provision does not affect the State’s other provisions regarding which operations must apply for permits.

15. Stockpiles. OAC 901:10-3-2 through 10-3-11 contain effluent limitations applicable to the production and land application areas at Large CAFOs. The rules generally provide, in part, that there shall be no discharge of manure from production areas at such CAFOs. ORC 903.01(AA) defines production areas to include manure storage and treatment facilities, among other features. While OAC 901:10-1-01(CCC) defines such facilities to include stockpiles without regard to the period of time over which they are maintained, OAC 901:10-1-01(JJJJ) appears to provide that stockpiles maintained for a period of 14 days or less are not included within the meaning of the term manure storage facilities. Based on this definition, it appears that stockpiles maintained for 14 days or less are not subject to the production area effluent limitations in OAC 901:10-3-2 through 10-3-11. ODA needs to revise this definition to ensure that manure stockpiles, even those maintained for less than 14 days, are considered part of a CAFO’s production area, and are thus subject to effluent limitations to the same extent as under the federal requirements.
16. Standard permit terms and conditions, monitoring and records. 40 CFR 122.41(l)(4) requires that monitoring results be reported on Discharge Monitoring Reports (DMRs). There does not appear to be a specific counterpart to this requirement in OAC 901, although OAC 901:10-3-10(L)(4) provides authority for ODA to require reporting on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than one [per] year. Please clarify whether this or other provisions provide authority to require permitted CAFOs to submit monthly monitoring reports. While the need for CAFOs to submit DMRs will be limited (e.g., for Medium CAFOs with discharges or facilities using voluntary alternative performance standards under 40 CFR Part 412), such authority remains necessary for implementation of a CAFO permitting program.
17. Bypass. 40 CFR 122.41 defines bypass as the intentional diversion of waste streams from any portion of a *treatment facility*. ODA’s regulations define bypass as any intentional diversion of manure from any portion of the *production area*. (OAC 901:10-3-10(T)) [emphasis added]. While recognizing that the state has tailored its bypass provision for the CAFO context, it appears that the change may expand the provision to encompass a much broader set of circumstances than the narrow ones addressed by the federal bypass regulation.



In addition, the wording in OAC 901:10-3-10(T)(4) of the State's bypass provision varies from the federal bypass provision at 40 CFR 122.41(m)(4)(i). Under the federal provision, all three circumstances listed in the provision must be satisfied to avoid a potential enforcement action for a bypass. By ending each paragraph with a period and failing to include the word 'and,' the Ohio provision appears to allow the possibility of avoiding enforcement if any of the three circumstances exist.

To address both of these issues, ODA will need to revise OAC 901:10-3-10(T)(4) to be consistent with the federal bypass provisions.

18. General permits. It is our understanding that ODA is not intending to establish a general permit by rule for CAFOs. However, some of the language in OAC 901:10-4-05, in particular the reference to "this permit" in the introductory paragraph, gives the appearance that ODA is attempting to establish a general permit-by-rule. If ODA intends for OAC 901:10-4-05 to establish an NPDES general permit-by-rule, then the Department will need to submit the rule to the Region for review under the CWA § 402(d) and 40 CFR 123.44 subsequent to any EPA, Region 5, approval of the present revision to the Ohio NPDES program. If it is not ODA's intent to establish a permit-by-rule for CAFOs, reference to "this permit" should be removed from OAC 901:10-4-05. Please clarify ODA's intent regarding a potential general permit-by-rule.
19. Response to complaints. Among other duties, 40 CFR 123.27(d) creates an obligation for a state implementing an NPDES program to investigate all complaints and to not oppose permissive intervention where authorized by statute or rule, or to provide for intervention as of right in civil or administrative actions by any citizen having an interest which is or may be adversely affected. In addition, 123.26(b)(4) requires states to have a process for consideration of publicly submitted information regarding violations. Under ORC 903.15(B), as well as OAC 901:10-5-01(B)(1) and (C), ODA appears to only be obligated to investigate complaints from persons aggrieved or adversely affected by an alleged nuisance, and only to investigate whether or not a CAFO owner or operator is in compliance with a permit. These provisions will need to be revised to ensure that ODA's obligation to investigate complaints is not limited to those made by persons who can show they have been aggrieved or adversely affected, and that it has full authority to investigate a complaint that may result in a finding of an unpermitted discharge.
20. Draft permits. 40 CFR 124.6(d) specifies elements that must be included in draft permits, including those drafted by state permitting authorities. ODA's regulations do not appear to address draft permit content. The State regulations will need to be revised to ensure that draft permits contain the elements required by the federal regulations.

21. 40 CFR 124.10(d)(iv) requires that the name, address and telephone number of a person from whom interested persons may obtain further information (including copies of the draft permit or draft general permit, as well as a statement of basis or fact sheet and the application) be included in a public notice. The state provision regarding the contents of public notice, OAC 901:10-6-02(A)(1), includes similar language, but refers to the location where records are located and may be inspected and copied. Under the federal provision, interested persons are able to request permit-related information without having to travel to the place it is maintained. Please clarify whether the public has similar ability to access permit-related information under the state provision. If not, this provision will need to be revised consistent with the federal requirement.
22. Additionally, it appears that some of the requirements in 40 CFR 124.10(d)(v) are absent from the Ohio requirements regarding public notices. Section 124.10(d)(v) requires the inclusion of a statement of procedures to request a hearing, the time and place that any hearing will be held, and other procedures by which the public may participate in the final permit decision. Such provision will need to be added to ODA's regulations to ensure that public notices will include the information required under the federal regulations.
23. Public Notice of permit actions and public comment period. 40 CFR 124.10(c)(iii) requires permitting authorities to provide public notice by mail to federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, etc. OAC 901:10-6-03(C) states that public notice regarding permit actions will be provided to state, interstate, federal and local government agencies *with jurisdiction over waters that may be affected by the discharge to waters of the State* [emphasis added]. Please provide clarification as to whether notice will be provided to the agencies within the scope and to the extent required by the federal requirements. In any event, ODA should remove the above highlighted language when it updates its regulations to incorporate revisions to the federal regulations, and replace it with language consistent with 124.10(c)(iii).
24. Response to public comments. Under 40 CFR 124.17, NPDES permitting authorities must consider and respond to comments submitted during a public comment period or during any hearing. The Statement of Legal Authority indicates on page 99 that OAC 901:10-6-04(J) requires a responsiveness summary for all public noticed permits, but OAC 901:10-6-04(J) deals with public meetings, and only appears to require a report on comments received during such public meetings. ODA will need to revise its regulations to ensure that a response to comments is required for all public noticed permits, or clarify which provision requires such a response in the event a public hearing is not held.

### **C. ODA-EPA Memorandum of Agreement (MOA)**

1. Regulation of AFOs/CAFOs discharging to POTWs. Pages 2-3 of the MOA indicate that Ohio EPA will retain jurisdiction for CAFO's discharging to Publicly Owned Treatment Works (POTW). Page 85 of the Statement of Legal Authority specifies that authority for POTWs will continue to reside with Ohio EPA, and that "any facility or operation subject to chapter 903 of the Revised Code that introduces manure, including process wastewater, into a publicly owned treatment works must comply with 40 CFR part 403 and chapter 6111 of the Revised Code and rules promulgated thereunder." This language suggests, but does not specifically state, which agency would regulate discharges from CAFOs to POTWs. Please provide clarification as to which agency has the authority and responsibility for regulating such operations.
2. Proposed permits, page 11. We had previously commented that this section should replace the term "draft" with "proposed" permits. Upon further consideration, we now believe that use of both terms is appropriate, and so withdraw that previous comment. We do, however, have an additional comment. Specifically, the revised language states that "U.S. EPA will, within 45 days after receipt of the draft or proposed individual permits..." This language could limit EPA's timeframe to object to draft permits to 45 days, which is less than the 90 days we otherwise have under the regulations and other sections of the MOA. Please revise this language to clarify that EPA will continue to have 90 days to review and object to draft permits as specified under section III.C.2 and III.C.3 of the MOA.

#### **D. Program Description**

Criminal investigation. ODA's criminal enforcement authority is at ORC 903.99. The MOA with EPA Region 5 commits ODA to implement an enforcement program, including a compliance assessment program, which enables ODA to take timely and effective enforcement for violations. The program description and organizational chart/position descriptions indicate that ODA has four livestock inspectors, and that through the Livestock Environmental Permitting Program Executive Director, ODA can refer criminal cases to the Attorney General's office. Please clarify whether ODA staff would include a criminal investigator, and if not, who would be assigned if there is a potential criminal issue.

## **II. Concern Regarding Land Application of Manure or Litter**

Surface application of manure or litter on snow or frozen soil. Paragraph (G) in rule 901:10-2-14 contains ODA's technical standards for application of manure, litter, and process wastewater on snow or frozen soil. EPA, Region 5, understands that the standards in paragraph (G) apply in addition to the technical standards expressed elsewhere in rule 901:10-2-14. Pages 46 through 48 of the Program Description describe enforcement procedures that ODA will implement when a CAFO fails to comply with the rules applicable to manure, litter, and

process wastewater application on snow or frozen soil. However, since the procedures in the Program Description will not apply to a CAFO that is not subject to enforcement, they do not establish technical standards for nutrient management as required by 40 CFR 123.36.

Appendix L in EPA's *Managing Manure Nutrients at Concentrated Animal Feeding Operations* (EPA-821-B-04-006, August 2004) contains winter spreading technical guidance. EPA, Region 5, used Appendix L to evaluate the ODA technical standards to determine the degree to which they affect the movement of nutrients and manure pollutants in runoff from melted snow where waters of the United States are downslope from a land application area and a crop will not be grown in the winter or nutrients need not be supplied in that season to grow a winter crop. For the purpose of step 1 in Appendix L, EPA established 18 pounds per acre as a "standard" for the mass of total nitrogenous (and carbonaceous) biochemical oxygen demand (BOD) that would be permitted in runoff from one inch of precipitation<sup>3</sup>. For the purpose of step 3, we established antecedent moisture condition III and 3° C as the design conditions for soil moisture and temperature, respectively. Based on the evaluation, EPA, Region 5, is concerned that the ODA technical standards will not minimize movement of nutrients to waters of the United States, as required by 40 CFR 123.36, when dairy, layer, or broiler manure or litter is surface applied on snow or frozen soil under the circumstances identified in the Attachment.

### **III. Technical corrections – ODA should address the following when it updates its regulations to incorporate the revised federal regulations.**

1. In OAC 901:10-2-14(C)(1)(e), "avoid" was not changed to "preclude" in the version of the rules we were provided, as ODA indicated it had done.
2. OAC 901:10-3-04 should cite "(II)", not "(HH)"
3. OAC 901:10-3-08 (B)(6): This section appears to be the equivalent requirement to section 124.62(b)(2) of the federal regulations. However, this provision cites to Section 301 of the CWA instead of Section 302(b)(2) of CWA, which is the section that applies to the modifications of effluent limitations and is cited in 124.62(b)(2). This citation should be corrected when ODA revises its regulations to incorporate revisions to federal regulations.
4. OAC 901:10-3-10 does not include a provision similar to 122.41(l)(4)(iii), which requires that calculations for all limitations that require averaging of

---

<sup>3</sup> Eighteen pounds per acre is the product of 160 milligrams per liter total BOD times the volume of water, 13,650 gallons, that will runoff an acre of land after one inch of water has been applied to Hydrologic Soil Group D soils under good hydrologic and saturated soil moisture conditions. One hundred sixty milligrams per liter is the concentration of total BOD that publicly-owned treatment works would need to meet on a maximum daily basis if they are to have a reasonable chance of achieving secondary treatment standards on a monthly average basis.



measurements use the arithmetic mean unless otherwise specified by the Director in the permit.

5. OAC 901:10-3-10(J)(1) Monitoring and records. Unlike the federal requirement regarding representativeness of samples at 122.41(i)(4), the State provision includes the qualifier "records of" before "samples and measurements," which potentially shifts the requirement for representativeness from the sample to the sampling records, and makes the requirement more limited in coverage than the federal requirement. The term "records of" should be deleted when ODA revises its rules to incorporate revisions to the federal regulations.

**Attachment**  
**Circumstances under which Surface Application of Manure or Litter**  
**on Snow or Frozen Soil is a Cause for Concern**

**Land Slope Greater Than Zero But Less Than or Equal to Six Percent**

1. Dairy, layer, or broiler manure or litter applied on Hydrologic Soil Group (HSG) D soils.
2. Dairy manure applied on HSG C soils.
3. Layer or broiler manure or litter applied on HSG C soils where the former crop was a row crop or small grain.
4. Dairy manure applied on HSG B soils where the former crop was a row crop.

**Land Slope Greater Than Six Percent**

1. Dairy manure applied on HSG D soils.
2. Dairy manure applied on HSG C soils where the former crop was a row crop or small grain.

ODA submitted a program to the U.S. EPA that complied with federal requirements and approval is obtained from the U.S. EPA. Ohio Rev. Code § 903.08(A). The General Assembly conditioned the transfer and ODA's authority to administer the NPDES program on or after the date the U.S. EPA approved the program. Ohio Rev. Code § 903.08(B); *Elder Aff.* at ¶ 11, (R. 17-10), Page ID# 530.

The enactment of this comprehensive environmental statute to create a regulatory program for CAFFs and CAFOs administered by ODA is an example of the State of Ohio exercising its power and authority to adopt and enforce statewide requirements to control water pollution within the State as recognized under the Clean Water Act and federal regulations.

**3. There is no federal equivalent to ODA's PTI and PTO program under the Clean Water Act.**

ODA's State permit program is not subject to the requirements of Clean Water Act or federal NPDES regulations because no PTI or PTO program exists under the Act. *Elder Aff.* at ¶10, (R. 17-10), Page ID# 530; *see also* 33 U.S.C. § 1342(b), 40 C.F.R. Part 123. ODA's PTIs and PTOs are not federally enforceable under the Act's § 402 NPDES permitting scheme because PTIs and PTOs do not regulate actual point source discharges of pollutants from CAFOs. *Id.* at ¶¶8-9, (R.17-10), Page ID# 529.

Also, the Clean Water Act does not regulate the design, construction,

operation, or maintenance of CAFOs. Rather, it regulates actual pollutant discharges from CAFOs. *Nat'l Pork Producers Council v. U.S. EPA.*, 635 F.3d 738, 750-751, (2011). Any attempt to regulate the construction or operation of a CAFO with an NPDES permit is *ultra vires* and beyond the regulatory scope of the NPDES program. *Id.* at 751.<sup>5</sup>

Since 2002, ODA has issued approximately 139 PTIs and 387 PTOs and PTO renewals to CAFFs as authorized by Ohio Rev.Code Chapter 903 and Ohio Adm. Code Chapter 901:10. *Elder Aff.* at ¶¶8-9, (R. 17-10), Page ID# 529-530. ODA has never issued an NPDES permit to a CAFF during its administration of the State program.

**4. The Askins mistakenly conflate the different regulatory programs administered by Ohio EPA and ODA for livestock operations.**

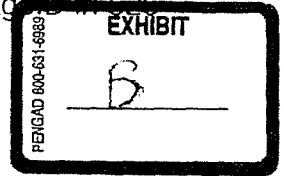
The Askins make several allegations regarding the manure management plans and permitting requirements of the Ohio EPA and ODA, which indicate that they may not understand how large livestock operations are regulated in the State of Ohio.

---

<sup>5</sup> The 2008 federal CAFO Rule required CAFOs to apply for an NPDES permit if the CAFO discharged or "proposed to discharge". Under 40 C.F.R. § 122.23(d) (2012 version), the term "proposed to discharge" meant the CAFO was designed, constructed, operated, or maintained such that a discharge will occur."

In accordance with the decision in the *National Pork Producers* case, the U.S. EPA amended 40 C.F.R. §122.23(d), which currently states as follows: (d) *NPDES permit authorization.*—(1) *Permit Requirement.* A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.





IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

Larry Askins, et al.,	:	Case No. 3:14 CV 1699 (DAK)
	:	
Plaintiffs,	:	
	:	JUDGE KATZ
v.	:	
	:	
Ohio Department of Agriculture, et al.,	:	
	:	
Defendants.	:	

---

AFFIDAVIT OF KEVIN ELDER

---

State of Ohio                    }  
County of Licking            } ss:

I, KEVIN ELDER, being of sound mind and the age of majority, and having been duly cautioned and sworn, state the following based on my personal knowledge, information, belief, and personal judgment:

1. I am the Chief of the Division of Livestock Environmental Permitting ("DLEP") of the Ohio Department of Agriculture ("ODA"). I have been employed by the ODA since January 15, 2001. I have a Bachelor of Science degree in agricultural education and animal science from the Ohio State University and have attended numerous additional training courses provided by the U.S. Department of Agriculture.
2. Currently, I am responsible for the administration and enforcement of the Permit to Install ("PTI") and Permit to Operate ("PTO") programs administered by ODA-DLEP. I supervise all DLEP personnel and review all inspection reports and enforcement documents

produced and issued by DLEP to new or existing permitted facilities that must comply with the statutory requirements of Ohio Revised Code Chapter 903, and the administrative regulations contained in Ohio Administrative Code Chapter 901:10. Also, I maintain a cooperative and productive relationship with the Ohio Environmental Protection Agency ("Ohio EPA") and the Ohio Department of Natural Resources ("ODNR") in regards to sharing information, compliance assistance, and enforcement coordination for animal feeding operations of any size. I also conduct presentations to regulators, industry groups, agricultural research-based entities, and citizens groups to educate the public on DLEP's administration of the PTI and PTO program for Concentrated Animal Feeding Facilities ("CAFFs") in Ohio.

3. I was and continue to be responsible for drafting administrative regulations for CAFFs.<sup>1</sup> I was responsible for organizing the CAFF Advisory Committee. Since the inception of the CAFF Advisory Committee, I have served as the representative of the Director of ODA on the committee and as vice chair of the committee. The Advisory Committee reviews and approves draft rules for CAFFs during several meetings held throughout the year. I am responsible for preparing the draft rules for further legal review and final rule approval through the Joint Committee on Agency Rule Review ("JCARR").

4. Prior to my employment at ODA, I was a staff member of the Fairfield Soil and Water Conservation District from 1976 to 1986. From 1986 to 2000, I was the Project Coordinator for the Agricultural Pollution Abatement and Land Treatment Section of the ODNR, Division of Soil and Water Conservation. From 2000 to 2001, I was the Administrator for Conservation Engineering and Technical Assistance for ODNR's Division of Soil and Water Conservation.

---

<sup>1</sup> Under R.C. Chapter 903, the PTI and PTO program regulates the activities of Concentrated Animal Feeding Facilities ("CAFFs"). However, the federal regulations use the term Concentrated Animal Feeding Operation ("CAFO") for facilities that are required to obtain an NPDES permit to regulate and control point source discharges.

5. I participated in drafting Senate Bill ("S.B.") 141, which was codified as R.C. Chapter 903 "Concentrated Animal Feeding Facilities Law." Also, I participated in the legislative hearings conducted prior to the passage of S.B. 141 in December 2000. My involvement was based on my duties and expertise as a livestock regulator in the Agricultural Pollution Abatement and Land Treatment Section of the Division of Soil and Water Conservation at ODNR.

6. Due to my involvement with the drafting and legislative hearings for S.B. 141, I have knowledge of the events that led the Ohio General Assembly to enact S.B. 141 in 2000. Prior to 2000, Ohio EPA issued PTIs and Livestock Waste Management Plans ("Waste Management Plans") to large animal feeding operations. Alexander Affidavit ¶11, Exhibit A. However, the livestock industry and various interests groups requested the Ohio General Assembly transfer the regulation of livestock operations from Ohio EPA to ODA in the late 1990s.

7. In December 2000, the Ohio General Assembly passed S.B. 141, which became effective on March 15, 2001, and codified R.C. Chapter 903 entitled "Concentrated Animal Feeding Facility Law." S.B. 141 also authorized ODA to adopt administrative rules under O.A.C. Chapter 901:10 entitled "Livestock Environmental Permitting", and created the Division of Livestock Environmental Permitting ("DLEP") to administer and enforce permits issued to CAFFs. Revised Code Chapter 903 transferred authority to ODA to issue PTIs, and establish a PTO program for CAFFs. R.C. 903 also authorized ODA to seek authority to administer an NPDES permit program for CAFOs. In August 2002, the PTI and PTO programs were finalized and ODA began issuing PTIs and PTOs to large CAFFs only.

8. Until R.C. Chapter 903 was codified, ODA did not have an enforcement program to regulate livestock operations. Revised Code Chapter 903.02 authorized the Director of ODA to establish a PTI program to regulate the installation, construction, and modification of new or

existing animal feeding facilities. PTI applicants are required to submit information to ODA regarding siting criteria; the size and design of manure storage and treatment facilities; a subsurface geological report; construction and engineering plans; water usage data; notification to local officials; and final inspection and stocking information. The PTI regulates the design and installation of earthen manure storage ponds and treatment lagoons or fabricated structures to prevent discharges to ground and surface waters. CAFFs are required to have enough storage volume to contain all manure, litter, processed wastewater, precipitation, and surface water runoff accumulated during minimum storage periods to minimize water pollution and prevent discharges. ODA issues PTIs to CAFFs that are designed not to discharge. The PTIs are not NPDES permits under the Clean Water Act and are not associated with Ohio EPA's NPDES permit program. ODA has exclusive jurisdiction to administer and enforce the CAFF PTI program under state law. Since 2002, ODA has issued approximately 139 PTIs to CAFFs.

9. Revised Code 903.03 authorized the Director of ODA to establish a PTO program to regulate the operation of the CAFFs. PTOs consist of a Manure Management Plan, Insect and Rodent Control Plan, Mortality Management Plan, Emergency Response Plan, and Operating Record. These planning documents are required to identify operational and management activities that will ensure proper waste management, efficient crop production, and environmental protection goals. Best management practices are required to manage the operation of the manure storage and treatment structures and the land application of manure at appropriate application rates to minimize nutrient transport from application fields to waters of the state. The PTO is not a Waste Management Plan or an NPDES permit. S.B. 141 did not transfer the Waste Management Plans formerly issued by Ohio EPA to ODA. The PTO is not administered according to the Clean Water Act and is not a part of Ohio EPA's NPDES permit



program for CAFOs. ODA has exclusive jurisdiction to administer and enforce the PTO program under state law. PTOs are issued to CAFFs with no designed discharge. ODA has issued approximately 387 PTOs and PTO Renewals since 2002.

10. The state PTI and PTO programs are not required under Section 402 of the Clean Water Act and federal regulations. U.S. EPA has no statutory oversight authority over ODA's PTI and PTO programs. The federal regulations do not require ODA to transmit PTI or PTO permits, or compliance and enforcement information to U.S. EPA. The federal regulations do not require ODA to obtain U.S. EPA's approval to administer the PTI and PTO programs or a Memorandum of Agreement ("MOA") between ODA and U.S. EPA governing the administration of the programs. Also, state laws and regulations do not require an MOA between ODA and U.S. EPA or Ohio EPA to administer the PTI and PTO programs. All the permits issued by ODA contain terms and conditions based on state law requirements. PTIs and PTOs do not contain effluent limits or water quality standards like NPDES permits.

11. Revised Code 903.08 authorized the Director of ODA to participate in the NPDES permit program according to the requirements of the Clean Water Act. R.C. 903.08 requires the Director to prepare a state program according to 40 CFR 123.21 for discharges of pollutants from CAFOs and AFOs, and submit the program to U.S. EPA for approval. After U.S. EPA approves the program, the authority to enforce NPDES discharge permits for CAFOs and AFOs previously issued by Ohio EPA will transfer to ODA. However, until the program delegation is approved, Ohio EPA will continue to issue NPDES permits to CAFOs and AFOs that discharge pollutants.

12. In 2002, ODA adopted CAFF rules for the state permitting program and CAFO rules for the proposed NPDES program. Also, ODA and Ohio EPA drafted and finalized an MOA to support the proposed transfer of the NPDES program in 2002. Alexander Affidavit ¶17.

However, as a result of statute and rule reviews by U.S. EPA Region 5, the 2003 final CAFO NPDES rules became effective and the Ohio General Assembly passed House Bill ("H.B.") 152 to reconcile R.C. Chapter 903 with the final CAFO NPDES rules. In 2005, U.S. EPA issued an informal critique of ODA's proposed CAFO NPDES regulations and identified some additional technical issues concerning ODA's proposed regulations meeting the 2003 federal CAFO Rule requirements. Also, U.S. EPA raised concerns about the authority of Ohio EPA and ODA to regulate discharges once the program is transferred. I assisted in drafting proposed amendments to R.C. 6111.04 and 903.08 to address U.S. EPA's concerns. In 2006, the General Assembly enacted S.B. 393 which codified the amendments to R.C. 6111.04 and 903.08. After the enactment of S.B. 393, U.S. EPA informed ODA that additional revisions to R.C. Chapter 903 were required.

13. In December 2006, the State of Ohio submitted the NPDES delegation for CAFOs to U.S. EPA for approval. *See* Exhibit B-1. A phased program approval was requested because amendments to S.B. 393 and ODA's rules would become effective in early 2007. In 2007, U.S. EPA reviewed the program submission and sent several letters to ODA citing statutory and regulatory concerns with ODA's authority to administer an NPDES permit program in compliance with the Clean Water Act. *See* Exhibit B-2. In 2008, ODA submitted several draft statute and rule packages to U.S. EPA in response to the agency's concerns. U.S. EPA issued a propose approval of the NPDES delegation contingent on additional statutory and rule revisions. *See* Exhibit B-3, B-4.

14. In 2008, U.S. EPA issued a revised CAFO rule that revised the 2003 federal CAFO regulations in response to the 2005 *Waterkeepers'* decision. H.B. 363 was drafted to amend several sections of R.C. Chapter 903 to support ODA's authority to regulate CAFOs. I assisted

in drafting proposed amendments to H.B. 363. In 2009, H.B. 363 was introduced and passed by the General Assembly.

15. In 2010, U.S. EPA raised concerns about the criminal intent standards contained in R.C. Section 903.99. Also, ODA submitted additional proposed amendments to its proposed NPDES rules to U.S. EPA for comparison and compliance with the federal regulations due to the 2008 revised CAFO rule. U.S. EPA provided informal comments on the proposed rule amendments and requested additional more revisions to ensure compliance with the federal CAFO rules. In 2011, ODA submitted rule amendments to U.S. EPA again for the proposed NPDES permit program.

16. From 2012-2013, ODA proposed legislation to the Ohio General Assembly for the enactment of R.C. 903.30 and proposed amendments to R.C. 903.99. The legislation addressed U.S. EPA's concerns about ODA's authority to enforce criminal violations of NPDES permits issued by ODA after U.S. EPA approves the program. R.C. 903.30 will prohibit violations of NPDES permits issued by ODA. R.C. 903.99 authorizes criminal fines and/or imprisonment against any person who negligently, recklessly, or knowingly violates the requirements of R.C. 903.30. I assisted in drafting the proposed statutory language for R.C. Sections 903.30 and 903.99 in H.B. 59. *See* Exhibit B-5. In July 2013, the General Assembly passed H.B. 59, which became effective in September 2013.

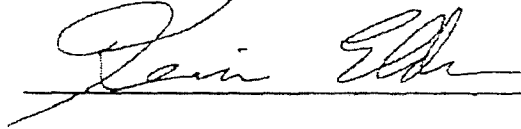
17. At present, ODA is in the process of updating the NPDES permit program for CAFOs for U.S. EPA's approval. U.S. EPA requires ODA to submit an updated program submission that includes the revised criminal statutes in order to make a final decision on Ohio's delegation request. *See* Exhibit B-6. The program update is currently taking place under my supervision. Nonetheless, Ohio EPA has issued NPDES permits to CAFOs throughout the entire delegation

process and will continue to do so until U.S. EPA approves the transfer.

18. Once U.S. EPA approves the program submission, the authority to issue NPDES permits to CAFOs will transfer from Ohio EPA to ODA. Under R. C. 903.08, ODA is authorized to issue a single PTO incorporating both state PTO and federal NPDES provisions. The state program requirements and planning documents contained in the PTO, such as the Manure Management Plan, Insect and Rodent Control Plan, Ground Water Monitoring requirements, Emergency Management Plans, and Operating Records, will be enforced under state law and designated as state requirements. The NPDES terms and conditions in the permit related to discharges from CAFOs will be enforced under federal law and designated as federal requirements. O.A.C.901:10-1-02(A) further explains that the NPDES permit provisions are established according to the Clean Water Act and are federally enforceable. ODA will issue a single PTO containing state PTO and federal delegated NPDES provisions to streamline the permitting process for efficiency reasons. However, ODA has not issued a PTO with NPDES provisions because U.S. EPA has not yet approved ODA's NPDES program for CAFOs. Therefore, at this time, ODA's PTOs only contain state law and regulatory requirements to regulate CAFFs that are designed not to discharge.

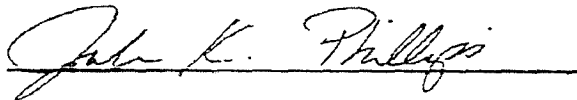


AFFIANT FURTHER SAYETH NAUGHT



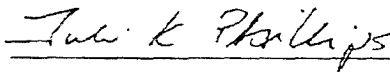
Kevin Elder

Affiant signed and swore to this affidavit in my presence, this 17th day of October 2014.



Julie K. Phillips, Attorney At Law  
NOTARY PUBLIC - STATE OF OHIO  
My commission has no expiration date  
Sec. 147.03 R.C.

NOTARY PUBLIC,



My commission expires on

\_\_\_\_\_

Federal Requirement/ Citation	State Citation	State Requirement	ODA Comment/EPA follow-up
40 CFR PART 122 EPA ADMINISTERED PERMIT PROGRAMS, THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM		40 CFR § 122.21 Application for a permit.	
122.21(a)		(D) In accordance with rules, an applicant for a NPDES permit issued under this section shall submit a fee in an amount established by rule together with, except as otherwise provided in division (F) of this section, an application for the permit to the director of agriculture on a form prescribed by the director. The application shall include any information required by rule.	
122.21(a)(1) *** The requirements for concentrated animal feeding operations are described in § 122.23(d).	ORC 903.08(D)		While not specifically referencing form 1, the rules, as noted under 40 CFR 122.21(a)(2)(i)(A) below, require submission of the same information contained in form 1 on forms approved by the Director of ODA. Current versions of the forms are available online at <a href="http://www.agri.ohio.gov/divs/LEPP/Lepp.aspx">http://www.agri.ohio.gov/divs/LEPP/Lepp.aspx</a> under the "Forms" sublink.
122.21(a)(2) *** Applications for EPA-issued permits must be submitted as follows:			
122.21(a)(2)(i)(A) All applicants, other than POTWS and TWTDS, must submit Form 1.	ORC 903.10(F)	The director of agriculture may adopt rules in accordance with Chapter 119, of the Revised Code that do all of the following: (f) Establish all of the following concerning NPDES permits: (5) Procedures for the submission of applications for permits and notices of intent to be covered by general permits, including information that must be included in the applications and notices; The rules adopted under division (F) of this section shall be consistent with the requirements of the Federal Water Pollution Control Act. 3) An application for a permit to install, a permit to operate, or a NPDES permit to be deemed complete, must include: (a) All required information as set forth in Chapter 901.10-2 and, if applicable, Chapter 901.10-3 of the Administrative Code, and shall accompany the application; and ... (c) Any supplemental information which is completed to the satisfaction of the director; ... (8) A certification statement as follows: ... (9) A complete application is required. (a) Any person who requires a permit shall complete, sign, and submit to the director an application for each permit required. (b) The director shall not begin the processing of a permit until the applicant has fully complied with the application requirements for the permit. (c) Permit applications must comply with the signature and certification requirements of this rule ... (D) NPDES permit. (1) Any person who discharges or proposes to discharge pollutants and who does not have an effective permit, except persons covered by a general permit under Chapter 901.10-4 of the Administrative Code, must submit a complete application to the director in accordance with this rule and Chapter 901.10-2 of the Administrative Code. ... (5) Applicants for concentrated animal feeding operations must submit form 2B. (C) Any person who discharges or proposes to discharge pollutants and who does not have an effective NPDES permit, except persons covered by a general NPDES permit, must submit a complete application to the director in accordance with this rule. The director shall not issue a NPDES permit before receiving a complete application for a NPDES permit except NPDES general permits. An application for a NPDES permit is complete when the director receives an application form and any supplemental information which are completed to his or her satisfaction. All applicants for NPDES permits must provide the following information to the director: (5) Applicants for concentrated animal feeding operations must submit form 2B.	Text has been significantly abridged for purposes of the cross-walk.
122.21(a)(2)(i)(C) Applicants for concentrated animal feeding operations or aquatic animal production facilities must submit Form 2B	OAC 901.10-1-02(D)(5)		Information listed below is also required on the application forms. Current versions of the forms are available online at <a href="http://www.agri.ohio.gov/divs/LEPP/Lepp.aspx">http://www.agri.ohio.gov/divs/LEPP/Lepp.aspx</a> under the "Forms" sublink.
122.21(f) *** New and existing concentrated animal feeding operations... shall provide the following information to the Director, using the application form provided by the Director:	ORC 903.08, 903.10(F); OAC 901.10-1-02, 901.10-3-01(C)	Must use forms approved by ODA - see language above.	

122.23(b)(1) AFO means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:	ORC 903.01(A),(B)	(A) "Agricultural animal" means any animal generally used for food or in the production of food, including cattle, sheep, goats, rabbits, poultry, and swine; horses; alpacas, llamas, and any other animal included by the director of agriculture by rule. "Agricultural animal" does not include fish or other aquatic animals regardless of whether they are raised at fish hatcheries, fish farms, or other facilities that raise aquatic animals. (B) "Animal feeding facility" means a lot, building, or structure where both of the following conditions are met:
122.23(b)(1)(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period; and	ORC 903.01(B)(1)	(1) Agricultural animals have been, are, or will be stabled or confined and fed or maintained there for a total of forty-five days or more in any twelve-month period.
122.23(b)(1)(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.	ORC 903.01(B)(2)	(2) Crops, vegetative forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot, building, or structure.
122.23(b)(2) CAFO means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.	ORC 903.01(F); see also definitions of Large CAFO, Medium CAFO, and Small CAFO cross-referenced in rule (ORC 903.01(M), (Q), and (EE))	F) "Concentrated animal feeding operation" means an animal feeding facility that complies with one of the following: (1) Has a total design capacity equal to or more than the number of animals specified in any of the categories in division (M) of this section; (2) Satisfies the criteria in division (M), (Q), or (EE) of this section; (3) Is designated by the director of agriculture as a medium or small concentrated animal feeding operation pursuant to rules.
122.23(b)(3) Land application area means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.	ORC 903.01(B) (part of definition of "animal feeding facility")	(B) . . . Two or more animal feeding facilities under common ownership shall be considered to be a single animal feeding facility for the purposes of this chapter if they adjoin each other or if they use a common area or system for the disposal of manure.
122.23(b)(4) Large CAFO. An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:	ORC 903.01(M)	(M) "Large concentrated animal feeding operation" means an animal feeding facility that stables or confines at least the number of animals specified in any of the following categories:
122.23(b)(4)(i) 700 mature dairy cows, whether milked or dry;	ORC 903.01(M)(1)	(1) Seven hundred mature dairy cattle whether milked or dry;
122.23(b)(4)(ii) 1,000 veal calves;	ORC 903.01(M)(2)	(2) One thousand veal calves;
122.23(b)(4)(iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;	ORC 903.01(M)(3)	(3) One thousand cattle other than mature dairy cattle or veal calves;
122.23(b)(4)(iv) 2,500 swine each weighing 55 pounds or more;	ORC 903.01(M)(4)	(4) Two thousand five hundred swine that each weigh fifty-five pounds or more;
122.23(b)(4)(v) 10,000 swine each weighing less than 55 pounds;	ORC 903.01(M)(5)	(5) Ten thousand swine that each weigh less than fifty-five pounds;
122.23(b)(4)(vi) 500 horses;	ORC 903.01(M)(6)	(6) Five hundred horses;
122.23(b)(4)(vii) 10,000 sheep or lambs;	ORC 903.01(M)(7)	(7) Ten thousand sheep or lambs;
122.23(b)(4)(viii) 55,000 turkeys;	ORC 903.01(M)(8)	(8) Fifty-five thousand turkeys;
122.23(b)(4)(ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;	ORC 903.01(M)(9)	(9) Thirty thousand laying hens or broilers if the animal feeding facility uses a liquid manure handling system;
122.23(b)(4)(x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;	ORC 903.01(M)(10)	(10) One hundred twenty-five thousand chickens, other than laying hens, if the animal feeding facility uses a manure handling system that is not a liquid manure handling system;
122.23(b)(4)(xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;	ORC 903.01(M)(11)	(11) Eighty-two thousand laying hens if the animal feeding facility uses a manure handling system that is not a liquid manure handling system;



## ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of December 8, 2016

Title 40 → Chapter I → Subchapter D → Part 122 → Subpart B → §122.21

Title 40: Protection of Environment

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Subpart B—Permit Application and Special NPDES Program Requirements

**§122.21 Application for a permit (applicable to State programs, see §123.25).**

(a) *Duty to apply.* (1) Any person who discharges or proposes to discharge pollutants or who owns or operates a "sludge-only facility" whose sewage sludge use or disposal practice is regulated by part 503 of this chapter, and who does not have an effective permit, except persons covered by general permits under §122.28, excluded under §122.3, or a user of a privately owned treatment works unless the Director requires otherwise under §122.44(m), must submit a complete application to the Director in accordance with this section and part 124 of this chapter. The requirements for concentrated animal feeding operations are described in §122.23(d).

(2) *Application Forms:* (i) All applicants for EPA-issued permits must submit applications on EPA permit application forms. More than one application form may be required from a facility depending on the number and types of discharges or outfalls found there. Application forms may be obtained by contacting the EPA water resource center at (202) 260-7786 or Water Resource Center, U.S. EPA, Mail Code 4100, 1200 Pennsylvania Ave., NW., Washington, DC 20460 or at the EPA Internet site [www.epa.gov/owm/npdes.htm](http://www.epa.gov/owm/npdes.htm). Applications for EPA-issued permits must be submitted as follows:

(A) All applicants, other than POTWs and TWTDS, must submit Form 1.

(B) Applicants for new and existing POTWs must submit the information contained in paragraph (j) of this section using Form 2A or other form provided by the director.

(C) Applicants for concentrated animal feeding operations or aquatic animal production facilities must submit Form 2B.

(D) Applicants for existing industrial facilities (including manufacturing facilities, commercial facilities, mining activities, and silvicultural activities), must submit Form 2C.

(E) Applicants for new industrial facilities that discharge process wastewater must submit Form 2D.

(F) Applicants for new and existing industrial facilities that discharge only nonprocess wastewater must submit Form 2E.

(G) Applicants for new and existing facilities whose discharge is composed entirely of storm water associated with industrial activity must submit Form 2F, unless exempted by §122.26(c)(1)(ii). If the discharge is composed of storm water and non-storm water, the applicant must also submit, Forms 2C, 2D, and/or 2E, as appropriate (in addition to Form 2F).

(H) Applicants for new and existing TWTDS, subject to paragraph (c)(2)(i) of this section must submit the application information required by paragraph (q) of this section, using Form 2S or other form provided by the director.

(ii) The application information required by paragraph (a)(2)(i) of this section may be electronically submitted if such method of submittal is approved by EPA or the Director.

(iii) Applicants can obtain copies of these forms by contacting the Water Management Divisions (or equivalent division which contains the NPDES permitting function) of the EPA Regional Offices. The Regional Offices' addresses can be found at §1.7 of this chapter.

(iv) Applicants for State-issued permits must use State forms which must require at a minimum the information listed in the appropriate paragraphs of this section.



**CURRENT ODA PERMITTED FACILITIES**

FACILITY	COUNTY	ANIMAL TYPE	NO. OF ANIMALS
5 C Farms	Defiance	Beef	(b)
(b) (6), LLC	Mercer	Chick. Layers	(6)
(b) (6)	Mercer	Chick. Layers	
A & K Enterprises, Inc.	Mahoning	Chick. Broilers	
(b) (6) Farm	Mercer	Chick. Layers	
Alberta Beach Farm, LLC	Stark	Chick. Broilers	
(b) (6) Farms	Shelby	Swine over 55 lbs.	
(b) (6) Farms, Inc.	Tuscarawas	Dairy	
(b) (6) Enterprises LTD	Mercer	Chick. Layers	
Banks of the Wabash Poultry	Darke	Chick. Layers	
(b) (6) Farms 1 & 2	Fulton	Swine over 55 lbs.	
Big Muddy Acres, Inc.	Mahoning	Chick. Broilers	
Blue Stream Dairy	Van Wert	Dairy	
(b) (6) Pork	Auglaize	Swine over 55 lbs.	
(b) (6) Farms	Ottawa	Swine over 55 lbs.	
Breeder Layer #2	Licking	Chick. Layers	
(b) (6) Poultry	Mercer	Chick. Layers	
(b) (6) Dairy, LLC	Williams	Dairy	
(b) (6) Poultry Farm	Darke	Chick. Pullets	
(b) (6) Swine Farm	Paulding	Swine over 55 lbs.	
(b) (6) Farms, Inc.	Mercer	Chick. Layers	
(b) (6) Finishers	Darke	Swine over 55 lbs.	
Cal-Maine Foods, Inc. Rossburg	Darke	Chick. Pullets	
Cal-Maine Foods Inc. Union City	Darke	Chick. Layers	
Canal Farm, LLC	Paulding	Swine over 55 lbs.	
CAP Farm, LLC	Stark	Chick. Broilers	
(b) (6) Dairies	Wayne	Dairy	
Cherrystone Farm	Darke	Chick. Pullet	
CJR Poultry & Swine, Inc. Layer Facility	Mercer	Chick. Layers	
CJR Poultry & Swine, Inc. Swine Facility	Darke	Swine over 55 lbs.	
CL Farm	Shelby	Swine over 55 lbs.	
Comp Dairy	Ashtabula	Dairy	
Courtney Road Farm, LLC	Mahoning	Chick. Broilers	
Creek View Farm	Paulding	Swine over 55 lbs.	
(b) (6) Hatchery and Breeder Pullet	Licking	Chick. Layers	
(b) (6) Layer 1	Licking	Chick. Layers	
(b) (6) Layer 2	Licking	Chick. Layers	
(b) (6) Layer 3	Licking	Chick. Layers	
(b) (6) Layer 4	Licking	Chick. Layers	
(b) (6) Pullet 1	Licking	Chick. Pullets	
(b) (6) Pullet 2	Licking	Chick. Pullets	
(b) (6) Pullet 3	Licking	Chick. Pullet	
CT Farms/Clover Four Inc.	Mercer	Swine over 55 lbs.	

D & N Swine Farm, LLC  
 D & T Poultry, Inc.  
 (b) (6) Dairy, LLC  
 DEAM Hog, LLC  
 Deer Run Farm  
 (b) (6) Poultry Farm  
 (b) (6) Pullet Farm  
 (b) (6) Brothers  
 (b) (6) Farms, LLP  
 (b) (6) Pullet Farm  
 (b) Homestead  
 (b) (6) Swine Farm  
 (b) (6) Farms, Inc.  
 (b) Poultry Farm  
 FDD Dairy  
 Featheridge Ridge Farm  
 (b) (6) Farms, Inc.  
 Flat Land Dairy  
 FNW Enterprises, LLC  
 (b) (6) Poultry Farm  
 Four Pines Farms, Ltd.  
 Fox Tail  
 G.J.D.  
 (b) (6) Pullets  
 (b) Dairy  
 Livestock  
 (b) Dairy  
 (b) (6) Pullet 5 & 6  
 (b) (6) Farms, Inc.  
 (b) (6) Farms  
 Heartland Quality Egg Farm (b) (6)  
 (b) (6) Swine Farm  
 (b) (6) Swine Farm, LLC  
 (b) (6) Poultry Farm, Inc.  
 (b) (6) Pork  
 (b) (6) Farms  
 Hillside Acres  
 (b) (6) Hens, LLC  
 (b) (6) Farms, LLC  
 Indian Trail Pullets, LLC  
 Irish Acres Sidney, LLC  
 J&A Poultry  
 J&K Swine Farm, LLC  
 (b) (6)  
 (b) (6) Swine  
 (b) (6)

Darke	Swine over 55 lbs.	(b) (6)
Mercer	Chick. Layers	(b) (6)
Marion	Dairy	(b) (6)
Miami	Swine over 55 lbs.	(b) (6)
Paulding	Swine over 55 lbs.	(b) (6)
Darke	Chick. Layers	(b) (6)
Darke	Chick. Pullets	(b) (6)
Mercer	Chick. Layers	(b) (6)
Darke	Swine over 55 lbs.	(b) (6)
Auglaize	Chick. Pullets	(b) (6)
Montgomery	Swine over 55 lbs.	(b) (6)
Preble	Swine over 55 lbs.	(b) (6)
Mercer	Chick. Layers	(b) (6)
Mercer	Chick. Layers	(b) (6)
Licking	Dairy	(b) (6)
Van Wert	Chick. Layers	(b) (6)
Putnam	Swine over 55 lbs.	(b) (6)
Paulding	Dairy	(b) (6)
Darke	Beef	(b) (6)
Darke	Chick. Layers	(b) (6)
Tuscarawas	Dairy	(b) (6)
Defiance	Swine over 55 lbs.	(b) (6)
Auglaize	Swine over 55 lbs.	(b) (6)
Mercer	Chick. Pullets	(b) (6)
Madison	Dairy	(b) (6)
Madison	Swine over 55 lbs.	(b) (6)
Van Wert	Dairy	(b) (6)
Hardin	Chick. Pullets	(b) (6)
Mercer	Chick. Layers	(b) (6)
Knox	Swine over 55 lbs.	(b) (6)
Logan	Chick. Layers	(b) (6)
Hardin	Swine over 55 lbs.	(b) (6)
Auglaize	Swine over 55 lbs.	(b) (6)
Wood	Chick. Layers	(b) (6)
Hardin	Swine over 55 lbs.	(b) (6)
Defiance	Chick. Layers	(b) (6)
Paulding	Swine over 55 lbs.	(b) (6)
Darke	Chick. Layers	(b) (6)
Mercer	Chick. Layers	(b) (6)
Mercer	Chick. Layers	(b) (6)
Shelby	Dairy	(b) (6)
Mercer	Chick. Layers	(b) (6)
Mercer	Chick. Layers	(b) (6)
Darke	Swine over 55 lbs.	(b) (6)
Logan	Swine over 55 lbs.	(b) (6)
Van Wert	Swine over 55 lbs.	(b) (6)
Darke	Chick. Layers	(b) (6)

173

(b) (6)	Mercer	Chick.Layers	(b) (6)
(b) (6) Farms	Preble	Swine over 55 lbs.	(b) 1
JP Poultry	Mercer	Chick. Layers	(b) (6)
JW Poultry	Darke	Chick.Layers	(b) (6)
(b) (6) Swine Research Farm	Wyandot	Swine over 55 lbs.	(b)
(b) (6) Poultry	Mercer	Chick. Layers	(b) (6)
KMLS Farms LLC	Putnam	Swine over 55 lbs.	(b) 3
(b) (6) Poultry Farm, LLC	Darke	Chick. Layers	(b) (6) 3
(b) (6) Pullet Farm	Mercer	Chick. Pullets	(b) (6)
(b) (6) Farms, LLC	Mercer	Dairy	(b)
Liberty Egg Farm, LTD	Van Wert	Chick. Layers	(b) (6)
( Farms, LLC	Mercer	Chick. Layers	(b) (6)
LK Poultry	Stark	Chick. Broilers	(b) (6)
Lucasville Sow Unit	Pike	Swine over 55 lbs.	(b) 2
Lucky 7 Farms, LLC	Hancock	Swine over 55 lbs.	(b) 5
M&M Farm	Darke	Chick. Pullets	(b) (6)
(b) (6) Farm	Mercer	Turkeys	(b)
Marseilles Layer 6	Wyandot	Chick. Layers	(b) (6) 2
(b) (6) Farms, Inc.	Mahoning	Dairy	(b) 5
(b) (6) Enterprises Inc.	Morrow	Swine over 55 lbs.	(b)
(b) (6) Dairy, LLC	Fayette	Dairy	(b) 2
(b) (6) Poultry Farm	Mercer	Chick. Pullets	(b) (6)
Miami Valley Dairy, LLC	Clark	Dairy	(b)
(b) (6) Dairy, LLC	Pickaway	Dairy	(b)
Mill Creek Dairy, LLC	Williams	Dairy	(b) 3
Millco Inc.	Darke	Swine over 55 lbs.	(b)
MJ (b) (6) Poultry Farms	Mercer	Chick. Layers	(b) (6)
MSB Farms	Wood	Dairy	(b)
Mt. Victory Layer 5	Hardin	Chick. Layers	(b) (6) 3
(b) (6) Farms, Ltd.	Mercer	Chick. Layers	(b) (6)
(b) (6) Dairy	Henry	Dairy	(b)
Nature Pure, LLC Farm 1	Union	Chick. Pullets	(b) (6)
(b) (6)	Darke	Swine over 55 lbs.	(b)
(b) (6) Farms-Mad River	Union	Chick. Layers	(b) (6)
(b) (6) Farms, LLC-Farm 3	Union	Chick. Layers	(b) (6)
(b) (6) Pullets, LLC	Darke	Chick. Pullets	(b) (6)
(b) (6) t Dairy	Madison	Dairy	(b) 3
(b) (6) Farm, LLC	Stark	Chick., Broilers	(b) (6)
Oakshade Dairy	Fulton	Dairy	(b)
(b) (6), LLC	Mahoning	Chick. Broilers	(b) (6)
(b) (6) Farm	Mercer	Chick. Layers	(b) (6)
(b) (6) Dairy	Paulding	Dairy	(b)
(b) (6) Farms, LLC	Paulding	Swine over 55 lbs.	(b)
(b) (6) d Hogs	Fulton	Swine over 55 lbs.	(b)
Pheasant Run	Defiance	Swine over 55 lbs.	(b)
(b) (6) Pork Farm	Greene	Swine over 55 lbs.	(b) 5
Premier Eggs- Scioto County	Scioto	Chick. Layers	(b) (6)

Premier Eggs- Stark	Stark	Chick. Layers	(b) (6) 3
Pro Milk Dairy	Pickaway	Dairy	(b) 3
Pullet Farm, (b) Farms, LLC	Logan	Chick. Pullets	(b) (6) 3
R & S Farms	Mercer	Chick. Layers	(b) (6) 3
(b) (6) Dairy, LLC	Wood	Dairy	(b) 3
(b) (6) Poultry, LLC	Mercer	Chick. Layers	(b) (6) 3
(b) (6) Swine Farm	Morrow	Swine over 55 lbs.	(b) 3
River Bend Swine	Paulding	Swine over 55 lbs.	(b) 3
River Downs Race Track	Hamilton	Horses	(b) 7
(b) (6) , LP	Mercer	Chick. Layers	(b) (6) 3
(b) (6) Dairy	Mercer	Dairy	(b) 3
(b) (6) Farms	Hancock	Swine over 55 lbs.	(b) 3
(b) (6) Farms	Mercer	Chick. Layers	(b) (6) 3
(b) (6) Farm	Paulding	Swine over 55 lbs.	(b) 3
(b) (6) Farms, LLC	Darke	Chick. Layers	(b) (6) 3
(b) (6) Egg Farm, LLC	Mercer	Chick. Layers	(b) (6) 3
Scioto Prairie	Crawford	Swine over 55 lbs.	(b) 3
(b) (6) Farms	Hardin	Swine over 55 lbs.	(b) 3
(b) (6) Inc.	Darke	Swine over 55 lbs.	(b) 3
(b) (6) Dairy, LLC	Williams	Dairy	(b) 3
ST-The Ohio Heifer Center	Clark	Beef	(b) 3
(b) (6) Pullet Farm	Darke	Chick. Pullets	(b) (6) 3
(b) (6) Sow Farm	Pickaway	Swine over 55 lbs.	(b) 3
(b) (6) Farms, LLC	Fairfield	Swine over 55 lbs.	(b) 3
(b) (6) Beef and Egg Farm, LLC	Darke	Chick. Layers	(b) (6) 3
Sugar Lane Dairy	Van Wert	Dairy	(b) 3
Sun Mountain Dairy, LLC	Henry	Dairy	(b) 3
Sunny Side Farms	Darke	Chick. Layers	(b) (6) 3
T & N Farms	Mercer	Chick. Layers	(b) (6) 3
T2 Farm Inc.	Mahoning	Chick. Broilers	(b) (6) 3
(b) Farm LLC	Stark	Chick. Broilers	(b) (6) 3
Thistledown, Inc.	Cuyahoga	Horses	(b) 3
(b) (6) Farms	Shelby	Swine over 55 lbs.	(b) 3
(b) Poultry Farm	Mercer	Chick. Layers	(b) (6) 3
Topaz Real Estate Inc.1 Farm 2	Union	Chick. Layers	(b) (6) 3
(b) Farms	Crawford	Swine over 55 lbs.	(b) 3
(b) (6) Farms, Inc.	Shelby	Swine over 55 lbs.	(b) 3
Twin Oak Dairy, LLC	Madison	Dairy	(b) 3
(b) Poultry	Mercer	Chick. Layers	(b) (6) 3
(b) (6) Dairy, LLC	Hardin	Dairy	(b) 3
(b) Dairy, LLC	Paulding	Dairy	(b) 3
(b) (6) Dairy	Putnam	Dairy	(b) 3
(b) (6) Dairy Farm	Clark	Dairy	(b) 3
(b) (6) Dairy, LLC	Defiance	Dairy	(b) 3
(b) (6) Farms	Darke	Swine over 55 lbs.	(b) 3
(b) Poultry, Inc.	Defiance	Dairy	(b) 3
VIZ Poultry, Inc.	Columbiana	Chick. Broilers	(b) (6) 3



(b) (6) Farms Ltd.  
(b) (6) Farms  
(b) (6) Poultry  
(b) (6) A-1 Farm  
(b) (6), Inc. Dew Fresh Farm  
(b) (6) Pullet Farm  
(b) (6) Farms  
(b) (6) Poultry Farm  
(b) (6) Farm, LLC  
(b) (6) Dairy, LLC  
White Oak Farm  
(b) (6) Eggs and Grain Farm, LLC  
(b) (6) Family Farms  
Willow Creek Farm, Inc.  
(b) (6) Hogs  
(b) (6) Farms  
(b) (6) Farm  
YNOT Farms, LLC  
(b) (6) Dairy

Hardin Dairy  
Stark Swine over 55 lbs.  
Mercer Chick. Layers  
Darke Chick. Layers  
Darke Chick. Layers  
Darke Chick. Pullets  
Darke Chick. Layers  
Mercer Chick. Layers  
Stark Chick. Broilers  
Putnam Dairy  
Paulding Swine over 55 lbs.  
Auglaize Chick. Layers  
Auglaize Chick. Pullets  
Mahoning Chick. Broilers  
Darke Swine over 55 lbs.  
Crawford Swine over 55 lbs.  
Mercer Chick. Layers  
Madison Swine under 55 lbs.  
Paulding Dairy

(b) (6)  
(b) (6)  
(b) (6) 3  
(b) (6) 0  
(b) (6) 5  
(b) (6) 0  
(b) (6) 0  
(b) (6) 0  
(b) (6) 0  
(b) (6) 0  
(b) (6) 0  
(b) (6) 5  
(b) (6) 1  
(b) (6) 0  
(b) (6) 0  
(b) (6) 0  
(b) (6) 3  
(b) (6) 2  
(b) (6)

## CAFO NPDES Permits (Active Permits &amp; Pending Applications)

FACILITY	COUNTY	ANIMAL TYPE	NO. OF ANIMALS
(b) (6) Land Company LLC (b)(6) (b) (6) )	Wood	Dairy	(b) (6)
(b) (6) Feedlots	Morrow	Swine over 55 lbs.	
(b) (6) - Mad River	Union	Chick. Layers	
(b) (6) Farms, Farm 3	Union	Chick. Layers	
(b) (6) Ethanol	Harrison	Dairy & Beef	(b) (6)
Ohio Feedlots	Clark	Dairy & Beef	(b) (6)
(b) (6) Farm	Mercer	Chickens	
Midwest Poultry - Sunnyside Farm	Darke	Chick. Layers	(b) (6)
New Thistledown, LLC.	Cuyahoga	Horses	(b) (6)
(b) (6) Dairy	Marion	Dairy	
(b) (6) Dairy	Van Wert	Dairy	(b) (6)
Oakshade Dairy	Fulton	Dairy	(b) (6)
(b) (6) Blue Sky (pka (b) (6))	Madison	Dairy	(b) (6)
(b) (6) Dairy	Paulding	Dairy	(b) (6)
(b) (6) Holsteins	Knox	Dairy	(b) (6)
(b) (6) Dairy	Putnam	Dairy	(b) (6)
(b) (6) Dairy (Prairie Creek)	Williams	Dairy	(b) (6)
(b) (6) Farms	Wayne	Dairy	(b) (6)
Ohio Fresh Eggs - Goshen	Hardin	Chick. Layers	
Ohio Fresh Eggs - Marseilles	Wyandot	Chick. Layers	(b) (6)
Ohio Fresh Eggs - Mt. Victory	Hardin	Chick. Layers	(b) (6)
(b) (6) (Stardust) Dairy	Madison	Dairy	(b) (6)
Ohio Fresh Eggs - (b)(6) Hatchery	Licking	Chick. Layers	
Ohio Fresh Eggs-Layer 1	Licking	Chick. Layers	(b) (6)
Ohio Fresh Eggs-Layer 2	Licking	Chick. Layers	
Ohio Fresh Eggs-Layer 3	Licking	Chick. Layers	(b) (6)
Ohio Fresh Eggs-Layer 4	Licking	Chick. Layers	(b) (6)
Ohio Fresh Eggs-Pullet 1	Licking	Chick. Pullets	(b) (6)
Ohio Fresh Eggs-Pullet 2	Licking	Chick. Pullets	(b) (6)
Ohio Fresh Eggs-Breeder 2 (PKA Pullet 3)	Licking	Chick. Pullets	(b) (6)
Ohio Fresh Eggs-Pullet 3 (PKA Pullet 4)	Licking	Chick. Pullets	
Blue Stream (pka (b) (6))	VanWert	Dairy	(b) (6)
(b) (6) Dairy	Clark	Dairy	(b) (6)
(b) (6) Farm (State Line)	Darke	Swine over 55 lbs.	(b) (6)
(b) (6) Dairy	Wood	Dairy	(b) (6)
Irish Acres Sidney, LLC	Shelby	Dairy	(b) (6)
(b) (6) Dairy	Henry	Dairy	(b) (6)
Sun Mountain (Maple Grove) Dairy	Henry	Dairy	(b) (6)
(b) (6) Farms	Ashland	Dairy	(b) (6)
(b) (6) , Inc.	Mercer	Dairy	(b) (6)
(b) (6) Farm	Logan	Swine over 55 lbs.	(b) (6)
(b) (6) Dairy Farms Inc.	Trumbull	Dairy & Beef	(b) (6)
(b) (6) Farm	Wayne		

**SELF-SEALING BUBBLE MAILER**

**Size #5 • 10.5 in. x 15 in. • No. 83031**

18-5028 • Re-order # 83031 • Compliance # MKM83031 • For all postage inquiries please contact your local post office • Comments/Questions? Visit our website: [www.legpages.com/uspsproducts](http://www.legpages.com/uspsproducts) • © 2007 United States Postal Service and United States Postal Service and United States Postal Service are trademarks of the U.S. Postal Service. All rights reserved. Made in U.S.A.

**From:** Vickie Askins

(b) (6)

Cygnat, OH 43413

**To:** Adm. Gina McCarthy  
Env. Protection Agency  
1200 Pennsylvania Ave  
Washington, D.C. 20

United States Postal Service®  
**SIGNATURE CONFIRMATION™**



1433 5031



**PRIORITY**

**MAIL**

visit us at [usps.com](http://usps.com)

Label 106A, May 2008